No. 16-373

Title:	California Public Employees' Retirement System, Petitioner v. ANZ Securities, Inc., et al.
Docketed:	September 22, 2016
Lower Ct:	United States Court of Appeals for the Second Circuit
Case Nos.:	(15-1879)
Decision Date:	July 8, 2016

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Sep 22 2016	Petition for a writ of certiorari filed. (Response due October 24, 2016)
Oct 19 2016	Order extending time to file response to petition to and including November 23, 2016.
Oct 21 2016	Brief amici curiae of The States of Washington, et al. filed.
Oct 24 2016	Brief amici curiae of Retired Federal Judges filed.
Nov 23 2016	Brief of respondents ANZ Securities, Inc., et al. in opposition filed.
Dec 7 2016	DISTRIBUTED for Conference of January 6, 2017.
Dec 7 2016	Reply of petitioner California Public Employees' Retirement System filed. (Distributed)
Jan 9 2017	DISTRIBUTED for Conference of January 13, 2017.
Jan 13 2017	Petition GRANTED limited to Question 1 presented by the petition.
Feb 17 2017	SET FOR ARGUMENT ON Monday, April 17, 2017.
Feb 22 2017	Record requested from U.S.C.A. 2nd Circuit.
Feb 22 2017	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the Petitioner.
Feb 27 2017	Record received from U.S.C.A. 2nd Circuit. The record is electronic.
Feb 27 2017	Joint appendix filed. (Statement of costs filed.)
Feb 27 2017	Brief of petitioner California Public Employees' Retirement System filed.
Mar 6 2017	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the respondent.
Mar 6 2017	Brief amici curiae of Institutional Investors filed.
Mar 6 2017	Brief amicus curiae of SRM Global Master Fund Limited Partnership filed.
Mar 6 2017	Brief amici curiae of Washington, et al. filed.
Mar 6 2017	Brief amici curiae of Current and Former Directors of Publicly Traded Companies: Charles M. Elson and Howard Wiener filed.
Mar 6 2017	Brief amici curiae of Civil Procedure and Securities Law Professors filed.
Mar 6 2017	Brief amicus curiae of DeKalb County Pension Fund filed.
Mar 6 2017	Brief amici curiae of Retired Federal Judges filed.
Mar 6 2017	Brief amici curiae of Public Citizen, Inc., and Public Justice, P.C. filed.
Mar 6 2017	Brief amici curiae of North American Securities Administrators Association, Inc. filed.
Mar 22 2017	CIRCULATED.
Mar 29 2017	Brief of respondents ANZ Securities, Inc., et al. filed. (Distributed)

Apr 5 2017	Brief amici curiae of The Securities Industries and Financial Markets Association, et al. filed. (Distributed)
Apr 5 2017	Brief amicus curiae of The Chamber of Commerce of the United States of America filed. (Distributed)
Apr 5 2017	Brief amicus curiae of Washington Legal Foundation filed. (Distributed)
Apr 10 2017	Reply of petitioner California Public Employees' Retirement System filed. (Distributed)
Apr 17 2017	Argued. For petitioner: Thomas C. Goldstein, Bethesda, Md. For respondents: Paul D. Clement, Washington, D. C.
Jun 26 2017	Adjudged to be AFFIRMED. Kennedy, J., delivered the opinion of the Court, in which Roberts, C. J., and Thomas, Alito, and Gorsuch, JJ., joined. Ginsburg, J., filed a dissenting opinion, in which Breyer, Sotomayor, and Kagan, JJ., joined.
Jul 28 2017	JUDGMENT ISSUED.

~~Name~~~~~~~~~~~~~~~~~~~~~~	~~~~~~~Address~~~~~~~~~~~~~~~~~~~	~~Phone~~~
Attorneys for Petitioner:		
Thomas C. Goldstein Counsel of Record	Goldstein & Russell, P.C. 7475 Wisconsin Avenue, Suite 850 Bethesda, MD 20814 tg@goldsteinrussell.com	(202) 362-0636
Party name: California Public Employees' Retirement System		
Attorneys for Respondents:		
Paul D. Clement Counsel of Record	Kirkland & Ellis LLP 655 Fifteenth Street, N.W. Washington, DC 20005 paul.clement@kirkland.com	(202) 879-5000
Party name: ANZ Securities, Inc., et al.		
Victor L. Hou	Cleary Gottlieb Steen & Hamilton LLP One Liberty Plaza New York, NY 10006 vhou@cgsh.com	(212) 225-2000
Party name: ANZ Securities, Inc., et al.		
Other:		
Max W. Berger	Bernstein Litowitz Berger & Grossmann LLP 1251 Avenue of the Americas, 44th Floor New York, NY 10020 max@blbglaw.com	(212) 554-1400
Party name: Institutional Investors		
David Boies	Boies, Schiller & Flexner LLP 333 Main Street Armonk, NY 10504 dboies@bsfllp.com	(914) 749-8200
Party name: SRM Global Master Fund Limited Partnership		
Callie Anne Castillo	Deputy Attorney General	(360) 753-6200

1125 Washington Street SE, Box 40100
Olympia, WA 98504-0100
calliec@atg.wa.gov

Party name: Washington, et al.

Alan D. Copsey — Deputy Solicitor General — (360) 753 6200
1125 Washington Street SE
Olympia, WA 98504-0100
alan.copsey@atg.wa.gov

Party name: The States of Washington, et al.

Ruthanne M. Deutsch — Deutsch Hunt, PLLC — (202) 868-6915
300 New Jersey Ave., NW
Washington, DC 20001
rdeutsch@deutschhunt.com

Party name: Current and Former Directors of Publicly Traded Companies: Charles M. Elson and Howard Wiener

David Freeman Engstrom — Stanford Law School — (650) 721-5859
559 Nathan Abbott Way
Stanford, CA 94305
dfengstrom@law.stanford.edu

Party name: Civil Procedure and Securities Law Professors

David C. Frederick — Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C. — (202) 326-7900
1615 M Street, N.W., Suite 400
Washington, DC 20036
dfrederick@kellogghansen.com

Party name: DeKalb County Pension Fund

Andrew Nathan Goldfarb — Zuckerman Spaeder — (202) 778-1822
1800 M Street, NW Suite 1000
Washington, DC 20036
agoldfarb@zuckerman.com

Party name: Retired Federal Judges

William M. Jay — Goodwin Procter LLP — (202) 346-4000
901 New York Avenue, N.W.
Washington, DC 20001
wjay@goodwinlaw.com

Party name: The Chamber of Commerce of the United States of America

Scott L. Nelson — Public Citizen Litigation Group — (202) 588-1000
1600 20th Street, N.W.
Washington, DC 20009
snelson@citizen.org

Party name: Public Citizen, Inc., and Public Justice, P.C.

Mark A. Perry	Gibson Dunn & Crutcher LLP 1050 Connecticut Ave., N.W. Washington, DC 20036-5306 mperry@gibsondunn.com	(202) 955-8500

Party name: The Securities Industries and Financial Markets Association, et al.

Lyle Roberts	Cooley LLP 1299 Pennsylvania Ave., Ste. 700 Washington, DC 20004 lroberts@cooley.com	(202) 842-7855

Party name: Washington Legal Foundation

Daniel S. Sommers	Cohen Milstein Sellers & Toll PLLC 1100 New York Avenue, NW West Tower, Suite 500 Washington, DC 20005 dsommers@cohenmilstein.com	(202) 408-4600

Party name: North American Securities Administrators Association, Inc.

ECORD
AND
RIEF

16-373

No. 16-___

Supreme Court, U.S.
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SEP 22 2016
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM,

Petitioner,

v.

MOODY INVESTORS SERVICE, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Darren J. Robbins
Joseph D. Daley
ROBBINS GELLER
RUDMAN & DOWD LLP
655 West Broadway
Suite 1900
San Diego, CA 92101

Thomas C. Goldstein
Counsel of Record
Kevin K. Russell
Tejinder Singh
GOLDSTEIN &
RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Washington, DC 20814
(202) 362-0636
tg@goldsteinrussell.com

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

This case presents two questions about whether, under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974), a member of a putative damages class can opt out of the class action and pursue its individual claims if the class action was timely, but the individual class member's complaint was filed more than three years after the offending conduct such that it could arguably be barred by a three-year statute of repose. The Second Circuit affirmed the dismissal of petitioner's claims as untimely, applying circuit precedent from a case in which this Court granted certiorari but did not reach the merits because the case settled. *See Police & Fire Ret. Sys. of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013), *cert. granted sub nom., Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, 134 S. Ct. 1515 (2014), *cert. dismissed as improvidently granted*, 135 S. Ct. 42 (2014). Here, the court of appeals acknowledged a circuit split, and stated that "the Supreme Court is in the best position to resolve" these questions, which "implicate[] the very nature of *American Pipe* tolling."

The Questions Presented are:

1. Does the filing of a putative class action serve, under the *American Pipe* rule, to satisfy the three-year time limitation in Section 13 of the Securities Act with respect to the claims of putative class members? (Question granted in *IndyMac*)

2. May a member of a timely filed putative class action file an individual suit on the same causes of action before class certification is decided, notwithstanding the expiration of the relevant time limitations?

PARTIES TO THE PROCEEDING

The following respondents were defendants-appellees in the Second Circuit:

Moody's Investors Service, Inc., McGraw-Hill Companies, Inc., Moody's Corporation, Ernst & Young, LLP, Brian M. Clarkson, Michael Kanef, Moody's Investors Service, Inc., Fidelity Management Trust Company, ANZ Securities, Inc., Citigroup Global Markets Inc., RBC Capital Markets Corporation, ABN AMRO Incorporated, Williams Capital Group L.P., BBVA Securities Inc., Greenwich Capital Markets, Inc., SunTrust Capital Markets, Inc., CIBC World Markets Corp., HSBC Securities (USA) Inc., HVB Capital Markets, Inc., M.R. Beal & Company, BNP Paribas S.A., ING Financial Markets LLC, Mellon Financial Markets, LLC, Natixis Bleichroeder Incorporated, Santander Investment Securities Inc., SG Americas Securities Holdings, LLC, Wells Fargo Securities, LLC, National Australia Capital Markets, LLC, Caja De Ahorros y Monte De Piedad De Madrid, Harris Nesbitt Corp., DZ Financial Markets LLC, Fortis Securities, LLC, RBS Greenwich Capital, BMO Capital Markets Corp., Mizuho Securities USA, Inc., Muriel Siebert & Co., Inc., Scotia Capital (USA) Inc., Sovereign Securities Corporation, LLC, Utendahl Capital Partners, L.P., Bankia, S.A., Raymond McDaniel, Jr., RBS WCS Holding Company, Daiwa Capital Markets Europe Limited, BNY Capital Markets, Inc., Wachovia Capital Markets, LLC, BNY Mellon Capital Markets, LLC.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES vi

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT STATUTORY PROVISION 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 9

I. The Question The Court Granted Certiorari To Decide In *IndyMac* Remains Certworthy 10

A. The Circuit Conflict Continues To Expand. 10

1. The Tenth Circuit Holds That American Pipe Applies To Section 13's Three-Year Period, While The Seventh And Federal Circuits Apply The Same Rule To Materially Indistinguishable Limitations In Other Statutes. 10

2. The Second, Sixth, And Eleventh Circuits Refuse To Apply American Pipe To The Securities Act's Periods Of Repose. 15

B. *IndyMac* Was Wrongly Decided. 16

1. American Pipe Did Not Establish A Rule Of Equitable Tolling Inapplicable To A Statute Of Repose 17

2. Applying American Pipe To Section 13 Does Not Contravene The Rules Enabling Act. 18

II. The Court Should Decide Whether A Limitations Period Can Bar A Class Member From Filing Its Own Action During The Pendency Of A Proper And Timely Class Action. 26

A. Members Of Pending, Timely Filed Putative Class Actions May File Their Own Suits Despite The Running Of The Statute Of Limitations Or Repose. 26

B. The Circuits Are Divided Over When Members Of A Timely Filed Class Action May File Their Own Lawsuits. 29

1. The Tenth Circuit Holds That The Filing Of A Putative Class Action Constitutes Filing Of Each Individual's Claim For Purposes Of Both The Statute Of Limitations And The Statute Of Repose. 30

2. The First And Sixth Circuits Hold The Opposite. 31

3. The Second Circuit Has Split The Baby. 32

4. The Ninth Circuit Has Held Statutes Of Limitations Are No Bar, But Has Not Addressed Statutes Of Repose. 33

III. This Case Presents The Court An Unparalleled Vehicle To Resolve These Important Questions That Have Bedeviled The Courts Of Appeals. 34

A. The Questions Presented Are Important. ... 34

B. This Case Presents An Exceptional Vehicle To Resolve Both Circuit Conflicts... 36

CONCLUSION 37

APPENDIX 1a

Appendix A, Court of Appeals Decision 1a

Appendix B, District Court Pretrial Order No. 73 ..... 7a

Appendix C, District Court Pretrial Order No. 39 ..... 9a

TABLE OF AUTHORITIES

CASES

Albano v. Shea Homes Ltd. P'ship,
634 F.3d 524 (9th Cir. 2011) 10

Am. Pipe & Constr. Co. v. Utah,
414 U.S. 538 (1974) ..... *passim*

Appleton Elec. Co. v. Graves Truck Line, Inc.,
635 F.2d 603 (7th Cir. 1980) 12, 13, 14

Arivella v. Lucent Techs., Inc.,
623 F. Supp. 2d 164 (D. Mass. 2009) 15

Bright v. United States,
603 F.3d 1273 (Fed. Cir. 2010) 14

Cada v. Baxter Healthcare Corp.,
920 F.2d 446 (7th Cir. 1990) 13

Chardon v. Fumero Soto,
462 U.S. 650 (1983) 18

Crown, Cork & Seal Co. v. Parker,
462 U.S. 345 (1983) 2, 20, 24

CTS Corp. v. Waldburger,
134 S. Ct. 2175 (2014) 17, 21

Dekalb Cty. Pension Fund v. Transocean Ltd.,
817 F.3d 393 (2d Cir. 2016), *petition for cert. docketed*, 16-206 (Aug. 15, 2016) 34

Dusek v. JPMorgan Chase & Co.,
132 F. Supp. 3d 1330 (M.D. Fla. 2015) 35

Dusek v. JPMorgan Chase & Co.,
No. 15-14463, – F.3d –, 2016 WL 4205857 (11th Cir. Aug. 10, 2016) 10, 16, 34, 36

Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (1974) 24

Erica P. John Fund, Inc. v. Halliburton Co.,
309 F.R.D. 251 (N.D. Tex. 2015) 22

Fort Worth Emps.' Ret. Fund v. J.P. Morgan Chase & Co.,
301 F.R.D. 116 (S.D.N.Y. 2014) 22

Friedman v. JP Morgan Chase & Co.,
No. 15-cv-5899 (JGK), 2016 WL 2903273 (S.D.N.Y. May 18, 2016) 35

Glater v. Eli Lilly & Co.,
712 F.2d 735 (1st Cir. 1983) 31

Hall v. Variable Annuity Life Ins. Co.,
727 F.3d 372 (5th Cir. 2013) 10

Holland v. Florida,
560 U.S. 631 (2010) 17

In re BP p.l.c. Sec. Litig.,
No. 4:13-cv-1393, 2014 WL 4923749
(S.D. Tex. Sept. 30, 2014)..... 27, 34

In re Hanford Nuclear Reservation Litig.,
534 F.3d 986 (9th Cir. 2007) 34

In re LIBOR-Based Fin. Instruments Antitrust Litig.,
No. 11 MDL 2262 NRB, 2015 WL
6243526 (S.D.N.Y. Oct. 20, 2015) 34

In re Merck & Co., Inc. Sec., Derivative & "ERISA" Litig.,
No. MDL 1658 (SRC), 2013 WL
396117 (D.N.J. Jan. 30 2013)..... 22

In re Regions Morgan Keegan Sec., Derivative & ERISA Litig.,
Nos. 2:13-cv-02841-SHM-dkv & 2:09-
2009-SHM-dkv, 2015 WL 10713983
(W.D. Tenn. July 31, 2015) 35

In re WorldCom Sec. Litig.,
496 F.3d 245 (2d Cir. 2007)..... 33

John R. Sand & Gravel Co. v. United States,
552 U.S. 130 (2008) 13

Joseph v. Wiles,
223 F.3d 1155 (10th Cir. 2000) .....*passim*

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,
501 U.S. 350 (1991) 6, 7, 11

Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning,
136 S. Ct. 1562 (2016) 20

Nat'l Credit Union Admin. Bd. v. Morgan Stanley & Co.,
No. 13 Civ. 6705(DLC), 2014 WL 241739 (S.D.N.Y. Jan. 22, 2014) 35

N. Sound Capital LLC v. Merck & Co.,
Nos. 3:13-cv-7240 (FLW)(DEA), 3:14-cv-7241 (FLW)(DEA), 3:13-cv-242 (FLW)(DEA) & 3:14-cv-241 (FLW)(DEA), 2015 WL 5055769 (D.N.J. Aug. 26, 2015) 35

Ortiz v. Fibreboard Corp.,
527 U.S. 815 (1999) 25

Phillips Petrol. Co. v. Shutts,
472 U.S. 797 (1985) 24

Prudential Ins. Co. of Am. v. Bank of Am., Nat'l Ass'n,
14 F. Supp. 3d 591 (D.N.J. 2014) 35

Police & Fire Ret. Sys. of Detroit v. IndyMac MBS, Inc., 721 F.3d 95 (2d Cir. 2013), *cert. granted sub nom.*, *Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, 134 S. Ct. 1515 (2014), *cert. dismissed as improvidently granted*, 135 S. Ct. 42 (2014) ..... *passim*

SRM Glob. Master Fund Ltd. P'ship v. Bear Stearns Cos., No. 14-507-cv, 2016 WL 3769735 (2d Cir. July 14, 2016) 34

State Farm Mut. Auto. Ins. Co. v. Boellstorff, 540 F.3d 1223 (10th Cir. 2008) 28, 30, 31

Stein v. Regions Morgan Keegan Select High Income Fund, Inc., 821 F.3d 780 (6th Cir. 2016) 10, 15, 32

Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011) 24, 28

Wyser-Pratte Mgmt. Co. v. Telxon Corp., 413 F.3d 553 (6th Cir. 2005) 32

STATUTES, RULES AND REGULATIONS

15 U.S.C.
§15b 19
§77k ..... *passim*
§77m ..... *passim*
§78u-4(a)(3) 23

28 U.S.C.
§1254(1) 1
§1658(b) 16, 25
§2072 17
§2072(b) 7, 18
§2501 14

49 U.S.C.
§16(3) 13

Federal Rules of Civil Procedure
Rule 23 ..... *passim*
Rule 23(b)(3) 5
Rule 23(c)(2) 12

SECONDARY AUTHORITIES

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PETITION FOR A WRIT OF CERTIORARI

Petitioner California Public Employees' Retirement System ("CalPERS") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 1a-6a) is unpublished but available at 2016 WL 3648259. The relevant opinions of the district court (Pet. App. 7a-13a) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 2016. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Section 77m of Title 15 of the U.S. Code provides in relevant part:

> **Limitation of actions**
>
> No action shall be maintained to enforce any liability created under [Section 11] . . . unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence . . . . In no event shall any such action be brought to enforce a liability created under [Section 11] . . . more than three years after the security was bona fide offered to the public . . . .

STATEMENT OF THE CASE

In *Public Employees' Retirement System of Mississippi v. IndyMac MBS, Inc.*, 134 S. Ct. 1515 (2014), *cert. dismissed as improvidently granted*, 135 S. Ct. 42 (2014), this Court granted certiorari to decide how the doctrine of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), applies to securities claims subject to the three-year limitations period of Section 13 of the Securities Act of 1933. *American Pipe* held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Id.* at 554. In *American Pipe* itself, this Court applied that rule to allow putative class members to intervene in a case after the district court denied class certification and the limitations period had run. Subsequently, this Court held the same rule applies when class members seek to file individual actions after class certification is denied. *See Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983).

In both cases, the defendants alleged the plaintiff's claims were untimely under a statute of limitations. *IndyMac* presented the question whether *American Pipe* tolling applies to a statute of repose as well. The Second Circuit had held that it did not, and this Court granted review. After this Court became aware that a tentative settlement was awaiting the district court's approval, however, it dismissed the case as improvidently granted. *See Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, 135 S. Ct. 42 (2014).

This case presents the opportunity to decide the question on which the Court granted certiorari in *IndyMac* and simultaneously resolve another circuit conflict over whether *American Pipe* applies when a class member files its individual suit *before* class certification is decided.

1. Prior to its bankruptcy in 2008, Lehman Brothers operated as a global investment bank whose stock traded on the New York Stock Exchange. Between July 2007 and January 2008, Lehman Brothers raised over $31 billion through debt offerings. Petitioner California Public Employees' Retirement System, the largest pension fund in the United States, purchased millions of dollars of those securities.

a. On June 18, 2008, another retirement fund filed a putative class action (the "Class Action") in the Southern District of New York. The complaint alleged that respondents, who were involved in underwriting the debt offerings, were liable under Section 11 for false and misleading statements in the registration statements. Among other things, the Class Action alleged that the registration statements contained untrue statements and omitted material facts concerning Lehman's accounting practices (including improperly removing tens of billions of dollars from its balance sheet), risk-management activities (including its accumulation of illiquid assets), and exposure to risky mortgage and real estate-related assets.

The Class Action asserted claims under Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k, which imposes liability upon underwriters and others for untrue or misleading statements or omissions in a

registration statement. Section 11 claims are subject to the limitations period set forth in Section 13 of the Act, which states in relevant part:

> **Limitation of actions**
>
> No action shall be maintained to enforce any liability created under [Section 11] . . . unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence . . . . In no event shall any such action be brought to enforce a liability created under [Section 11] . . . more than three years after the security was bona fide offered to the public . . . .

15 U.S.C. § 77m.

It is undisputed that the Class Action was timely filed under this provision by a class representative with standing to assert the claim, and that petitioner was a proper member of the putative class.

In February 2011, more than three years after the securities were offered to the public but before the district court had decided whether to certify the class, petitioner elected to take charge of its own claims by filing a Section 11 suit against respondents in the Northern District of California. Complaint, *Cal. Pub. Emps.' Ret. Sys. v. Fuld*, No. 3:11-cv-00562-EDL (N.D. Cal. Feb. 7, 2011). The case was subsequently transferred to the Southern District of New York and consolidated with the Class Action for pretrial purposes by order of the U.S. Judicial Panel on Multidistrict Litigation. *See* MDL Transferred In,

Cal. Pub. Emps.' Ret. Sys. v. Fuld, No. 3:11-cv-01281-LAK (S.D.N.Y. Feb. 25, 2011).

Later that year, the parties to the Class Action reached a settlement and the district court preliminarily certified a class for settlement purposes under Federal Rule of Civil Procedure 23(b)(3). Upon receiving the court-ordered notice of the settlement, petitioner opted out to pursue its own claims individually.

The district court, however, dismissed petitioner's individual suit as untimely. Pet. App. 7a, 12a. In so doing, it rejected petitioner's argument that the pendency of the timely filed Class Action rendered CalPERS' individual lawsuit timely. *Id.* 10a-13a.

2. The Second Circuit affirmed. Pet. App. 6a. The court of appeals began by observing that it had "held previously that *American Pipe* tolling does not affect the statute of repose embodied in section 13," citing its decision in *IndyMac*. *Id.* 3a.

a. In *IndyMac*, retirement pension systems from Detroit and Wyoming filed separate putative class actions against the same defendant, alleging false and misleading statements in multiple offerings of mortgage-backed securities. When the cases were consolidated, Wyoming was appointed lead plaintiff and Detroit was left to be represented by Wyoming as a member of Wyoming's putative class. Wyoming then amended its complaint to include securities that Detroit had purchased but Wyoming had not. Approximately six months later, the district court determined that Wyoming did not have standing to assert claims on behalf of the class (including Detroit)

with respect to any security it had not itself purchased. When Detroit moved to intervene to assert those claims, the district court held it was too late – by then, Section 13's three-year limitations period had run on the claims and, the court held, *American Pipe* did not apply to toll it. *See* 721 F.3d at 102-03.

The Second Circuit affirmed. It began from the premise that Section 13's three-year limitations period established a statute of repose, not a statute of limitations. *See IndyMac*, 721 F.3d at 107. As such, the court believed, the three-year provision created a "*substantive* right in those protected to be free from liability after a legislatively-determined period of time." *Id.* at 106 (citation omitted). This mattered, the court believed, because "while statutes of limitations are often subject to tolling principles, a statute of repose *extinguishes* a plaintiff's cause of action after the passage of a fixed period of time" and therefore is not subject to equitable tolling. *Id.* (citations and internal quotation marks omitted). That is why, for example, in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), this Court had refused to apply equitable tolling to Section 13's three-year period of repose. *See IndyMac*, 721 F.3d at 109.

The question, then, was whether *American Pipe* had created a principle of *equitable* tolling that was presumptively inapplicable to a statute of repose, or a rule of *legal* tolling (*i.e.*, one based on the courts' interpretation of a statute or rule), which might apply. On that question, the Second Circuit acknowledged, the "Courts of Appeals are divided." *Id.* at 108 (citing cases from the Second, Fourth,

Ninth, Tenth, and Federal Circuits); *see also id.* ("Experienced and capable judges of the district courts in our Circuit have similarly drawn disparate conclusions and are without consensus.").

Rather than wade into that conflict, the Second Circuit instead concluded that it made no difference. On the one hand, if *American Pipe*'s "tolling rule is properly classified as 'equitable,' then application of the rule to Section 13's three-year repose period is barred by *Lampf*, which states that equitable 'tolling principles do not apply to that period.'" *IndyMac*, 721 F.3d at 109 (quoting *Lampf*, 501 U.S. at 363). But "[e]ven assuming, *arguendo*, that the *American Pipe* tolling rule is 'legal' – based upon Rule 23, which governs class actions – we nonetheless hold that its extension to the statute of repose in Section 13 would be barred by the Rules Enabling Act." *Id.* The court explained that the Rules Enabling Act provides that in issuing federal rules of practice and procedure, the courts "shall not abridge, enlarge or modify any substantive right." *Id.* (quoting 28 U.S.C. § 2072(b)). And while the Second Circuit recognized that this Court had rejected a Rules Enabling Act objection in *American Pipe* itself, *id.* at 109 n.17, it concluded Section 13's statute of repose was different because "Section 13 creates a *substantive* right," *id.* at 109.

The court acknowledged that "failure to extend *American Pipe* tolling to the statute of repose in Section 13 could burden the courts and disrupt the functioning of class action litigation." *Id.* But it believed that "sophisticated, well-counseled litigants" would find some unspecified way of avoiding those ills. *Id.* And if they did not, it was Congress's problem, not the courts'. *Id.* at 110.

b. In this case, the court of appeals concluded that *IndyMac* required dismissal of petitioner's complaint. The court did not dispute that unlike the situation in *IndyMac* itself, petitioner had filed its individual action during the pendency of a class certification motion that was ultimately granted. It acknowledged petitioner's argument that "because it fell within the putative class before exercising its right to opt out, its claims were essentially 'filed' against the defendant within three years and therefore timely." Pet. App. 4a. But the court found that argument precluded by the binding circuit precedent in *IndyMac*. To "the extent that CalPERS argues that *American Pipe* tolling should be conceptualized as something other than 'tolling' as that term is generally understood," the panel explained, "that argument was presented to the *IndyMac* panel, which declined to adopt it." *Id.* 4a-5a.

The court of appeals closed by acknowledging the need for this Court's review:

> [T]he question whether *American Pipe* tolling applies to statutes of repose – and if so, when – may be ripe for resolution by the Supreme Court. Our decision in *IndyMac* created a circuit split with the Tenth Circuit, and the issue implicates the very nature of *American Pipe* tolling, a question the Supreme Court is in the best position to resolve. . . . [U]nless and until the Supreme Court informs us that our decision was erroneous, *IndyMac* continues to be the law of the Circuit and its reasoning controls the outcome of this case.

Pet. App. 5a-6a (citations omitted).

REASONS FOR GRANTING THE WRIT

As the Second Circuit rightly recognized, this case calls out for the Court's review. It presents an opportunity to resolve two entrenched circuit conflicts over the application of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), to securities litigation. The first Question Presented replicates the question this Court granted certiorari to decide two terms ago in *IndyMac* but did not resolve. Since this Court dismissed that writ, the circuit split over whether *American Pipe* applies to statutes of repose has only expanded and become more entrenched. The second Question Presented – whether *American Pipe* applies when a member of a timely filed putative class action files an individual suit before class certification is decided – has likewise fractured the circuits for years.

Only this Court can resolve these conflicts because they are ultimately founded on a deep disagreement over the nature of *American Pipe*'s rule – specifically, whether it creates a rule of legal, as opposed to equitable, tolling (the first Question Presented), and whether it establishes only a tolling rule or also a definition of when a class member's claim is deemed filed for limitations purposes (the second Question Presented). Until this Court intervenes, those disagreements will continue to produce intolerable variations in class action practice to the detriment of defendants, alleged victims, and district courts across the country.

I. The Question The Court Granted Certiorari To Decide In *IndyMac* Remains Certworthy.

The years since this Court granted certiorari in *IndyMac* have done nothing but increase the need for review of the first Question Presented.

A. The Circuit Conflict Continues To Expand.

To start, the widely acknowledged[1] circuit conflict over *American Pipe*'s application to Section 13 and other statutes of repose has only grown, with the Sixth and Eleventh Circuits recently joining the pre-existing split.

1. *The Tenth Circuit Holds That* American Pipe *Applies To Section 13's Three-Year Period, While The Seventh And Federal Circuits Apply The Same Rule To Materially Indistinguishable Limitations In Other Statutes.*

a. The first circuit to address *American Pipe*'s application to Section 13's period of repose was the Tenth. In *Joseph v. Wiles*, 223 F.3d 1155, 1168 (10th

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[1] *See Dusek v. JPMorgan Chase & Co.*, No. 15-14463, – F.3d – , 2016 WL 4205857, at *3 (11th Cir. Aug. 10, 2016) (observing that "[c]ourts have disagreed over the basis for the Supreme Court's decision in *American Pipe*" and, as a consequence, over its application to statutes of repose); *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F.3d 780, 792 (6th Cir. 2016) ("Our fellow Circuits are split."); *Hall v. Variable Annuity Life Ins. Co.*, 727 F.3d 372, 375 n.5 (5th Cir. 2013) (acknowledging division); *Albano v. Shea Homes Ltd. P'ship*, 634 F.3d 524, 535 (9th Cir. 2011) (same).

Cir. 2000), as in this case, a class action asserting Section 11 claims was timely filed in federal court. Later, after the expiration of Section 13's three-year limitations period, one of the class members filed his own suit. The initial class action was subsequently certified, but the individual suit was deemed untimely. On appeal, the Tenth Circuit reversed, holding that *American Pipe* saved the individual claim. *Id.* at 1166-68.

In particular, the court rejected the argument that *American Pipe* applied a principle of equitable tolling inapplicable to Section 13's statute of repose. For one thing, the court concluded that *American Pipe* was best viewed as applying legal, not equitable, tolling. The court explained that "[e]quitable tolling is appropriate where, for example, the claimant has filed a defective pleading during the statutory period, or where the plaintiff has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Id.* at 1166 (citations omitted). "In contrast," the Tenth Circuit explained, *American Pipe* applied "legal tolling that occurs any time an action is commenced and class certification is pending." *Id.* at 1166-67. For that reason, the defendants' reliance on *Lampf v. Gilbertson*, 501 U.S. 350 (1991), was misplaced even if *Lampf* stood for the proposition that equitable tolling principles could never apply to a statute of repose. *Joseph*, 223 F.3d at 1166.

Lampf was also inapposite, the Tenth Circuit held, because it simply stated that "litigation . . . must be *commenced* . . . within three years after [a] violation." *Id.* at 1167 (quoting *Lampf*, 501 U.S. at 364) (first alteration in original). *American Pipe* had decided, however, that the filing of a class action

commences the litigation for all putative class members for purposes of any limitations period. *Id.* For that reason, "in a sense, application of the *American Pipe* tolling doctrine to cases such as this one does not involve 'tolling' at all." *Id.* at 1168.

At the same time, applying *American Pipe* to both time limits under Section 13 "serves the purposes of Rule 23." *Id.* at 1167. That rule, the court explained, "encourages judicial economy by eliminating the need for potential class members to file individual claims." *Id.* But if "all class members were required to file claims in order to insure the limitations period would be tolled, the point of Rule 23 would be defeated." *Id.* Moreover, the "notice and opt-out provision of Rule 23(c)(2) would be irrelevant without tolling because the limitations period for absent class members would most likely expire, 'making the right to pursue individual claims meaningless.'" *Id.* (citation and internal quotation marks omitted).

Finally, the Tenth Circuit recognized that the legislative purposes of Section 13's limitations periods were satisfied because once the class action was filed, "defendants were on notice of the substantive claim as well as the number and generic identities of potential plaintiffs." *Id.* at 1168.

b. The Tenth Circuit's holding in *Joseph* is consistent with decisions of the Seventh and Federal Circuits that have likewise concluded *American Pipe* applies to limitations periods that are otherwise not subject to equitable tolling.

In *Appleton Electric Co. v. Graves Truck Line, Inc.*, 635 F.2d 603 (7th Cir. 1980), the Interstate

Commerce Commission had invalidated a tariff that governed shipping prices charged by trucking companies to customers. One such customer sued under the Interstate Commerce Act on behalf of overcharged shippers, naming as defendants a class of trucking companies that had charged the invalidated rate. One of the members of the defendant class, Graves Truck Line, did not receive individual notice and an opportunity to opt out until after the statute of limitations had expired. *Id.* at 607. When Graves subsequently opted out, the plaintiff sued it individually, giving rise to the question whether the pendency of the class action had satisfied the limitations period against Graves. *Id.* at 607-08.

Appleton is relevant here because this Court had deemed the statute of limitations at issue in that case jurisdictional. 635 F.2d at 608 (citing 49 U.S.C. § 16(3)). And a jurisdictional limitations period shares the two features *IndyMac* and other cases have said render *American Pipe* inapplicable to statutes of repose: (1) a jurisdictional limitation is not subject to equitable tolling;[2] and (2) the running of the limitations period "not only bars the remedy but also destroys the liability." *Id.*; *see also IndyMac*, 721 F.3d at 106.

Accordingly, the Seventh Circuit faced the same essential question as the Tenth Circuit in *Joeseph* and the Second Circuit in *IndyMac*: whether these

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[2] *See, e.g.*, *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 134 (2008); *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990).

features precluded applying *American Pipe* to save the plaintiff's claims. Like the Second Circuit in *IndyMac*, the Seventh Circuit viewed the case as presenting a "conflict between the operation of the statute of limitations and Rule 23." *Appleton*, 635 F.2d at 609. But unlike the Second Circuit, the Seventh resolved that perceived conflict in favor of "'effectuat[ing] . . . the purpose of litigative efficiency and economy,' (which Rule 23 was designed to perform)." *Id.* (quoting *Am. Pipe*, 414 U.S. at 556). It held that "where a class action suit is instituted against a class of unnamed defendants . . . the statute of limitations is tolled as to all putative members of the defendant class." *Id.* at 609-10. "A contrary rule would sound the death knell for suits brought against a defendant class, nullifying that part of Rule 23 that specifically authorizes such suits." *Id.* at 610. "Plaintiffs would, in each case, be required to file protective suits, pending class certification, to stop the running of the statute of limitations." *Id.* In a case like the one before it, the court observed, that would result "in the filing of a staggering number of complaints." *Id.* At the same time, applying *American Pipe* to a jurisdictional time limit "was not truly inconsistent with the operation of the statute of limitations." *Id.* at 609.

The Federal Circuit likewise has concluded that *American Pipe* applies to jurisdictional time limitations. In *Bright v. United States*, 603 F.3d 1273 (Fed. Cir. 2010), that court considered application of *American Pipe* to the jurisdictional limitations period for the Tucker Act, 28 U.S.C. § 2501. 603 F.3d at 1287. The Federal Circuit held that *American Pipe* applied because it applies a legal, not an equitable,

tolling rule. *Id.* at 1287-88. A contrary conclusion would create a class action process that was "so cumbersome and unwieldy" that it would "frustrat[e] the purpose of avoiding multiplicity of suits." *Id.* at 1289.

2. The Second, Sixth, And Eleventh Circuits Refuse To Apply American Pipe *To The Securities Act's Periods Of Repose.*

The Second, Sixth, and Eleventh Circuits disagree. As discussed, the Second Circuit in *IndyMac* reasoned that Section 13 created a statute of repose to which *American Pipe* could not be applied consistent with the Rules Enabling Act. *See* Pet. App. 3a (citing *IndyMac*, 721 F.3d at 95).

The Sixth Circuit recently reached the same conclusion. In *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F.3d 780 (6th Cir. 2016), the Sixth Circuit acknowledged that its "fellow Circuits are split" over *American Pipe*'s application to Section 13's three-year limitations period. *Id.* at 792. But after examining both the Tenth and Second Circuit's reasoning, the Sixth Circuit concluded that "*IndyMac* has the more cogent and persuasive rule." *Id.* at 793.[3]

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[3] In those circuits that have no governing circuit precedent, district courts have reached conflicting decisions, although the overwhelming majority has held that *American Pipe* applies to Section 13 and other statutes of repose. *See Arivella v. Lucent Techs., Inc.*, 623 F. Supp. 2d 164, 177-78 (D. Mass. 2009) (collecting citations); Petition for a Writ of Certiorari at 17-18,

Most recently, the Eleventh Circuit likewise found the reasoning of the Sixth and Second Circuits more persuasive. *Dusek v. JPMorgan Chase & Co.*, No. 15-14463, – F.3d –, 2016 WL 4205857 (11th Cir. Aug. 10, 2016). The plaintiffs in *Dusek* brought claims under Section 20(a) of the Securities Exchange Act, which is subject to the limitations period of 28 U.S.C. § 1658(b). The Eleventh Circuit explained that, like Section 13, Section 1658(b) has been "construed by courts as having a two-year statute of limitations and a five-year period of repose." *Dusek*, 2016 WL 4205857, at *2. The court then examined the reasoning of *Joseph*, *IndyMac*, and *Stein*. *Id.* at *3-4. After recounting that "[t]he district court ultimately relied on these decisions in determining that the *American Pipe* rule is one of equitable tolling," the Eleventh Circuit affirmed and held "that *American Pipe* tolling does not apply to the statute of repose at issue in th[at] case." *Id.* at *5.

B. *IndyMac* Was Wrongly Decided.

Review of the first Question Presented is also warranted because the Second Circuit's decision in *IndyMac* is wrong.

Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc., No. 13-640 (Nov. 22, 2013).

1. American Pipe *Did Not Establish A Rule Of Equitable Tolling Inapplicable To A Statute Of Repose.*

First, there is no basis for the Second Circuit's suggestion that *American Pipe* created the kind of equitable tolling inapplicable to a statute of repose.

Unlike equitable tolling, which generally is available at a judge's discretion "when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action," *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014); *Holland v. Florida*, 560 U.S. 631, 649 (2010), this Court has made clear that *American Pipe* tolling applies to all class members, whether or not they have paid attention to the suit or diligently pursued their rights, *see Am. Pipe*, 414 U.S. at 551-52.

That is because the rule of *American Pipe* was derived not from equity, but from this Court's interpretation of Rule 23, which was promulgated through an exercise of this Court's rulemaking authority under the Rules Enabling Act, 28 U.S.C. § 2072. Applying ordinary tools of legal interpretation – rather than equitable balancing – the Court examined the text, history, and purposes of the rule. *Am. Pipe*, 414 U.S. at 453-56. The Court was "convinced that the rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Id.* at 554.

This "interpretation" of Rule 23 was "necessary to insure effectuation of the purposes of litigative efficiency and economy that the Rule in its present form was designed to serve." *Id.* at 555-56 (emphasis added). The Court reaffirmed that *American Pipe* was an interpretation of Rule 23 in *Chardon v. Fumero Soto*, 462 U.S. 650 (1983), explaining that in *American Pipe*, it had "*interpreted the Federal Rules of Civil Procedure* to permit a federal statute of limitations to be tolled between the filing of an asserted class action and the denial of class certification," *id.* at 654 (emphasis added), to achieve the "federal interest in assuring the efficiency and economy of the class action procedure," *id.* at 661.

2. *Applying* American Pipe *To Section 13 Does Not Contravene The Rules Enabling Act.*

The Second Circuit also erred in concluding that applying *American Pipe* to Section 13 would violate the Rules Enabling Act. The court reasoned that the Act prohibits applying the federal rules in a way that would "abridge, enlarge, or modify any substantive right," 28 U.S.C. § 2072(b). It then concluded that, as a statute of repose, Section 13 "creates a *substantive* right, extinguishing claims after a three-year period." *IndyMac*, 721 F.3d at 109. "Permitting a plaintiff to file a complaint or intervene after the repose period" had run, the court concluded, "would therefore necessarily enlarge or modify a substantive right and violate the Rules Enabling Act." *Id.* That reasoning fails for several reasons.

First, *American Pipe* itself rejected the premise that the Rules Enabling Act prohibits any application

of a rule that can be said to affect substantive rights. 414 U.S. at 557-58.[4] The question "is not whether a time limitation is 'substantive' or 'procedural,' but whether tolling the limitation in a given context is consonant with the legislative scheme." *Id.* "[T]he mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose." *Id.* at 559.

The same is true of Section 13's statute of repose. The question is whether applying *American Pipe* to actions like this one is consistent with the statute's purposes – if it is, then applying it invades no substantive right of a defendant but rather reflects that Congress never intended defendants to be free from liability to the class members whose claims were timely filed under the rule.

Second, applying the correct standard, *American Pipe* is consistent with the Rules Enabling Act

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[4] *IndyMac* also overstated the degree to which Section 13's three-year limitations period establishes a materially more substantive right than its one-year statute of limitations, which the court acknowledged was subject to *American Pipe*. The statutory text does not expressly extinguish or confer any rights, nor does it forbid tolling. In fact, the language of these provisions is no more absolute than the Clayton Act's limitations provision at issue in *American Pipe*, which stated that an action "shall be forever barred" if not commenced in time. 15 U.S.C. § 15b. If that language did not extinguish rights in the manner of a statute of repose, it is difficult to see why the language of Section 13 does.

because it is entirely consonant with the Securities Act's limitations scheme.

Language. Section 13 requires that any Section 11 action "be brought" within three years after the security was offered to the public. 15 U.S.C. § 77m. "'Brought' in this context means 'commenced.'" *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1568 (2016) (quoting *Brought*, Black's Law Dictionary (3d ed. 1933)). And in *American Pipe*, this Court held that "a timely class action complaint commences the action for all members of the class as subsequently determined." 414 U.S. at 550. That interpretation of the statute is supported by the provision's use of the passive voice – no action "shall . . . be brought," 15 U.S.C. § 77m – which encompasses a representative bringing a suit on another's behalf. By refusing to address the question more specifically than that, Congress left it to the courts to decide how the provision would apply to representative actions (including class actions). *American Pipe* took up that responsibility, answering the question by sensibly considering the rules governing and purposes behind class action litigation.

Purposes. Applying *American Pipe* to Section 13 is also consistent with the legislative purposes of the Securities Act. "Limitations periods are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights, but these ends are met when a class action is commenced." *Crown, Cork & Seal*, 462 U.S. at 352 (citation omitted). Moreover,

> a class complaint "notifies the defendants not only of the substantive claims being brought against them, but also of the number and

> generic identities of the potential plaintiffs who may participate in the judgment." The defendant will be aware of the need to preserve evidence and witnesses respecting the claims of all the members of the class.

Id. (quoting *Am. Pipe*, 414 U.S. at 555).

"Statutes of repose also encourage plaintiffs to bring actions in a timely manner, and for many of the same reasons." *CTS Corp.*, 134 S. Ct. at 2183. In addition, statutes of repose "effect a legislative judgment that a defendant should be free from liability after the legislatively determined period." *Id.* *American Pipe* is entirely consistent with that purpose because it guarantees that after the limitations period has expired, no liability will be imposed beyond that claimed in lawsuits filed on or before that date.

Of course, litigation over those timely filed claims may well continue long after the period of repose has expired. There is no argument, for example, that the policy of repose is violated when a defendant is held liable to members of a timely filed class action in a case certified after the limitations period has run. But the purpose of a statute of repose is not to provide defendants complete certainty as to the scope of their liability, but instead to fix the *outer limit* of their *potential* liability. *American Pipe* simply informs defendants that this outer limit includes possible liability to members of putative class actions filed within the statute of repose. Whether that liability is resolved through a certified class action or through individual suits by class members is irrelevant as far as the policies underlying the statute of repose are concerned.

Practical Consequences. Congress could not possibly have intended the intolerable results that would arise if *American Pipe* did not apply to Section 13 or other statutes of repose.

The Second Circuit did not deny that refusing to apply *American Pipe* to Section 13's period of repose would have exactly the same effects this Court found untenable in *American Pipe* itself. In many cases, a final class certification decision may not take place until years after the limitations period has expired – particularly when suit is filed close to the end of the limitations periods or if class issues are appealed.[5] In light of this reality, under *IndyMac*, "[p]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable," thereby "breed[ing] needless

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[5] A recent study found that that ruling on class certification takes three years or longer in more than one-third of cases. *See* Svetlana Starykh & Stefan Boettrich, *Recent Trends in Securities Class Action Litigation: 2015 Full-Year Review* 20 (2016), http://www.nera.com/content/dam/nera/publications/2016/2015_Securities_Trends_Report_NERA.pdf; *see also, e.g.*, *Erica P. John Fund, Inc. v. Halliburton Co.*, 309 F.R.D. 251, 255 (N.D. Tex. 2015) (class certification order issued more than ten years after securities issued); *Fort Worth Emps.' Ret. Fund v. J.P. Morgan Chase & Co.*, 301 F.R.D. 116, 123-24 (S.D.N.Y. 2014) (approximately seven years); *In re Merck & Co., Inc. Sec., Derivative & "ERISA" Litig.*, No. MDL 1658 (SRC), 2013 WL 396117, at *1 (D.N.J. Jan. 30 2013) (approximately nine years); Final Judgment & Order of Dismissal at 2, *In re McKesson HBOC, Inc. Sec. Litig.*, No. 5:99-cv-20743 (N.D. Cal. Apr. 13, 2007) (approximately eight years); Order Granting in Part Lead Plaintiff' Second Renewed Motion for Class Certification at 2, *In re Xerox Sec. Litig.*, No. 3:99-cv-2374 (AWT) (D. Conn. Sept. 30, 2008) (same).

duplication of motions." *Am. Pipe*, 414 U.S. at 553-54.

The Second Circuit's rule also dramatically augments the cost of class litigation. Each potential opt-out plaintiff incurs the additional expense to retain counsel, file an individual complaint, and then monitor all of the activity in the entire litigation.[6] Defendants must likewise pay their counsel to monitor and respond to the many duplicative pleadings and redundant briefing *IndyMac* prompts. The courts must expend substantial additional effort to manage all the complaints and deal with each party's counsel. Everyone – the courts, plaintiffs, and defendants – must bear the added expense of discovery addressing each of the various claims individually.

And all for no conceivable purpose. Under the *IndyMac* rule, sophisticated plaintiffs will file protective individual actions, providing no real benefit to either defendants or the judicial system. At the same time, class members who are less sophisticated or well-resourced predictably will forfeit their claims if class certification is denied. While defendants would benefit from this injustice, they

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[6] In this respect, *IndyMac* undermines the design of the Private Securities Litigation Reform Act, which requires securities class actions to be helmed by a single, sophisticated lead plaintiff – as opposed to a collection of plaintiffs advancing a flotilla of complaints. *See* 15 U.S.C. § 78u-4(a)(3). The rule of *IndyMac* predictably balkanizes almost every high profile action, as multiple institutional (and other sophisticated) investors will file their own suits to avoid the prospect that befell the plaintiffs in *IndyMac* and this case.

cannot claim that this windfall amounts to a substantive right Congress intended Section 13 to bestow.

Constitutional Avoidance. Refusing to apply *American Pipe* to statutes of repose would raise grave constitutional questions.

"In the context of a class action predominantly for money damages," this Court has "held that absence of notice and opt-out violates due process." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011) (citing *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 812 (1985)). But the constitutional right to opt out would be illusory if opting out simply provided an individualized opportunity to have one's claims immediately dismissed as untimely. *See Crown, Cork & Seal*, 462 U.S. at 351-52 (recognizing the need for the opt-out right to remain meaningful even after the limitations period has run); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 & n.13 (1974) (same). Yet, under *IndyMac*, in a great many cases, class members' opt-out rights arise only after a statute of repose has expired. *See supra* 22 & n.5. In the Class Action, for example, the district court did not rule on class certification until more than four years after the suit was filed.[7] As a result, opt-out notices were not sent until well after Section 13's three-year limitations period. In this common circumstance, *IndyMac* renders the opt-out right meaningless – the

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[7] *See* Pet. App. 10a (noting that Class Action was filed on October 27, 2008); Pretrial Order No. 59 (Class Certification Ruling), *In re Lehman Bros. Sec. & ERISA Litig.*, No. 1:08-cv-05523-LAK-GWG (S.D.N.Y. Jan. 23, 2013).

only way for class members to have any chance of vindicating their legal rights is to remain members of the class.

The burden on class members' due process opt-out right is even greater in cases involving multiple different claims with different limitations periods. Assume, for example, that a class complaint states claims under Section 11 of the 1933 Securities Act (subject to Section 13's three-year statute of repose) and also under Section 10(b) of the 1934 Act (subject to a five-year period under 28 U.S.C. § 1658(b)). As in this case, the class is certified and proceeds toward settlement. If the limitations period has run on the Section 11 claims but not the Section 10(b) claims, then individual plaintiffs who wish to pursue their Section 10(b) claims on their own are in a predicament because they cannot opt out *in part. Thus, they can either remain in the class – accepting* a settlement of all of their claims and forgoing their right to litigate the Section 10(b) claims as they see fit – or they can opt out, in which case their Section 11 claims will be time-barred.

The constitutional right to opt out is based in "our deep-rooted historic tradition that everyone should have his own day in court." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (quotation marks omitted). A rule that permits class members to opt out but not pursue their own individual claims does just as much violence to this tradition as simply prohibiting plaintiffs from opting out. Accordingly, even if the Rules Enabling Act could be read to prohibit applying *American Pipe* to Section 13, the Act must yield to the superior demands of the Due Process Clause.

II. The Court Should Decide Whether A Limitations Period Can Bar A Class Member From Filing Its Own Action During The Pendency Of A Proper And Timely Class Action.

Even if the Court agrees with the Second Circuit that *American Pipe* tolling does not apply to Section 13's three-year limitation, it should hold that petitioner's claims were timely asserted because they were initially presented within the limitations period by the Class Action complaint and then maintained continuously thereafter, first by the class representative on petitioner's behalf and later by petitioner itself in its own lawsuit. On this understanding, no tolling was required and the Rules Enabling Act is not implicated.

In reviewing this argument, the Court could resolve both the proper application of Section 13 in a substantial portion of cases in which the defense arises and a related, multifaceted circuit conflict.

A. Members Of Pending, Timely Filed Putative Class Actions May File Their Own Suits Despite The Running Of The Statute Of Limitations Or Repose.

In *IndyMac* and *American Pipe* itself, the class member waited until class certification was denied before attempting to intervene or file a new action. In other cases, including this one, a class member has sought to file its own action *before* the district court rules on class certification but after the relevant statute of limitations and/or repose has expired. In such circumstances, tolling is not required because

the class member's action was timely commenced and maintained without interruption.

Although the *American Pipe* rule is frequently referred to as a "tolling" rule, it also reflects a pragmatic understanding of what it means to commence a suit for purposes of satisfying a limitations period in the special context of a class action. The Court explained that under the modern rules governing class actions, "the difficulties and potential for unfairness which, in part, convinced some courts to require individualized satisfaction of the statute of limitations by each member of the class, have been eliminated." *Am. Pipe*, 414 U.S. at 550. The Court thus declared that "there remain no conceptual or practical obstacles in the path of holding that the filing of a timely class action complaint *commences the action for all members* of the class as subsequently determined." *Id.* (emphasis added).

Therefore, "when an unnamed, putative class member later files its own individual claim, it is not instituting a new action subject to the statute of limitations and statute of repose; it is simply taking over the prosecution of its individual claim from the putative class representative." *In re BP p.l.c. Sec. Litig.*, No. 4:13-cv-1393, 2014 WL 4923749, at *4 (S.D. Tex. Sept. 30, 2014). As the Tenth Circuit has repeatedly observed, "in a sense, application of the *American Pipe* tolling doctrine to cases such as this one does not involve 'tolling' at all." *Joseph*, 223 F.3d at 1168.

That conception of this case finds support not only in *American Pipe* but also in the Due Process Clause, which guarantees individual class members

the right to opt out of a class and pursue their own claims with their own attorneys. *See Wal-Mart*, 564 U.S. at 363.

Moreover, no other timing rule makes sense. For example, it would make no sense to hold that unnamed class members' claims are "brought" only once the class is certified, because certification often occurs after the limitations period has run, and no court holds that the unnamed class members' claims are time-barred in that circumstance.

Here, petitioner's claims were presented by a class representative within Section 13's time limits. That class was entirely proper and eventually certified. When petitioner exercised its constitutional right to control its own litigation and have its own day in court, it simply "retook the reins from" the class representatives who "pre-filed [petitioner's] suit" when they brought their timely putative class action. *State Farm Mut. Auto. Ins. Co. v. Boellstorff*, 540 F.3d 1223, 1233 (10th Cir. 2008).[8] Petitioner's suit was therefore timely even without tolling.

There is no plausible Rules Enabling Act objection to this resolution of the case, which turns on

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[8] Tolling may be required when, as in *American Pipe* or *IndyMac*, a class member seeks to assert claims substantially *after* class certification has been denied, if there is a material period of time after the expiration of the limitations period during which the member has no pending claims (*i.e.*, no claim by virtue of the class action complaint and no individual complaint yet filed). For the reasons given in Section I.B, *supra*, to the extent tolling is required in those circumstances, *American Pipe* supplies it, whether the limitations period is viewed as a statute of limitations or a statute of repose.

an interpretation of when an action is "brought" within the meaning of Section 13 rather than anything in the federal rules. Nor, in any event, does this interpretation abridge any "substantive right" of the defendant. Respondents in this case, for example, would have had no grounds to challenge the timeliness of petitioner's claim if petitioner had remained a member of the Class Action. Instead, respondents object only to petitioner pursuing its claim individually rather than through the class. But nothing in Section 13 or the Rules Enabling Act gives defendants a "substantive right" to force a plaintiff to litigate its Section 11 claim through a class representative.

B. The Circuits Are Divided Over When Members Of A Timely Filed Class Action May File Their Own Lawsuits.

Granting certiorari on the second Question Presented would not only ensure the Court fully addressed the issue presented by this case and many others like it, but would also provide the Court an opportunity to resolve another enduring circuit conflict over the meaning and application of *American Pipe*. Specifically, the circuits are divided multiple ways over when, if ever, a plaintiff in petitioner's position can file its own suit after the relevant limitations periods have run.

1. *The Tenth Circuit Holds That The Filing Of A Putative Class Action Constitutes Filing Of Each Individual's Claim For Purposes Of Both The Statute Of Limitations And The Statute Of Repose.*

In *Boellstorff*, 540 F.3d 1223, the Tenth Circuit considered whether *American Pipe* "applies when an individual member of a putative class pursues an independent, individual claim before the district court has decided the class certification issue but after a non-tolled statute of limitations would have run." *Id.* at 1224. Recognizing that the "four circuits that have offered opinions on the issue have split evenly," *id.*, the Tenth Circuit held that "a plaintiff who chooses to bring an individual action while the class action is pending can still claim the benefit of the *American Pipe* tolling doctrine," *id.* at 1230.

Despite referring to *American Pipe* "tolling," the Tenth Circuit recognized that "in a sense, application of the *American Pipe* tolling doctrine to cases such as this one does not involve 'tolling' at all." *Boellstorff*, 540 F.3d at 1232 (quoting *Joseph*, 223 F.3d at 1168). The court explained:

> The class action mechanism's inherent representativeness means that each putative class member "has effectively been a party to an action" against the defendant "since a class action covering him" was filed. [*Joseph*, 223 F.3d at 1168]. *American Pipe* made much of this principle, positing that the class action tolling doctrine would apply regardless of the reliance or awareness of putative class members. 414 U.S. at 551-52. Thus, when Clark filed a class action against State Farm

> in August 2000, alleging the same claims later asserted by Boellstorff, Clark in essence pre-filed Boellstorff's suit. Thereafter, when Boellstorff filed her independent suit she simply retook the reins from Clark.

Id. at 1232-33 (parallel citation omitted).[9]

In reaching this conclusion, the court relied on its prior decision in *Joseph*, which, as discussed earlier, applied the same rule to Section 13's statute of repose, *see supra* 10-12. Accordingly, in the Tenth Circuit, neither Section 13's statute of limitations nor its statute of repose bars class members from pursuing an individual action before class certification is decided, so long as the class action was timely filed.

2. *The First And Sixth Circuits Hold The Opposite.*

The First and Sixth Circuits take the opposite position, holding that every individual suit filed after the running of a statute of limitations or repose is untimely if filed before class certification is resolved.

In *Glater v. Eli Lilly & Co.*, 712 F.2d 735 (1st Cir. 1983), the First Circuit reasoned that "*American Pipe*

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[9] The plaintiff in *Boellstorff* brought state law claims subject to Colorado's version of Rule 23. But because "neither the Colorado Supreme Court nor any Colorado appellate court ha[d] spoken to the instant issue," the Tenth Circuit "anticipate[d] that the Colorado Supreme Court would, as we do, find persuasive the reasoning of" federal cases holding a class member's suit timely when filed during the pendency of a timely filed putative class action. *Boellstorff*, 540 F.3d at 1228.

says nothing about" a class member's "ability to maintain a separate action while class certification is still pending." *Id.* at 739. It further concluded that "[t]he policies behind Rule 23 and *American Pipe* would not be served, and in fact would be disserved, by guaranteeing a separate suit at the same time that a class action is ongoing." *Id.* Although the case involved a statute of limitations bar, the reasoning would apply *a fortiori* to the stricter requirements of a statute of repose. *See id.*

In *Stein*, 821 F.3d 780, the Sixth Circuit staked out the same position. The court explained that under its decision in *Wyser-Pratte Management Co. v. Telxon Corp.*, 413 F.3d 553 (6th Cir. 2005), "a plaintiff who chooses to file an independent action without waiting for a determination on the class certification issue may not rely on the *American Pipe* tolling doctrine." *Stein*, 821 F.3d at 789 (quoting *Wyser-Pratte*, 413 F.3d at 568). The Court "recognize[d] that *Wyser-Pratte* now represents the minority rule." *Id.* (citing contrary decisions from the Second, Ninth, and Tenth Circuits). But the fact "[t]hat several of our fellow Circuits chose not to follow our reasoning does not make *Wyser-Pratte* any less binding." *Id.* With respect to certain claims filed after class certification was denied, the Sixth Circuit embraced *IndyMac*'s rejection of *American Pipe* tolling for Section 13's statute of repose. *See supra* 15.

3. The Second Circuit Has Split The Baby.

The Second Circuit has taken yet a third course, holding that *American Pipe* preserves the timeliness

of a class member's individual suit under a statute of limitations, but not a statute of repose.

The plaintiffs in *In re WorldCom Securities Litigation*, 496 F.3d 245 (2d Cir. 2007), filed their own securities fraud complaints after the statute of limitations had run but during the pendency of a timely filed putative class action of which they were members. *Id.* at 248-51. The Second Circuit held their claims timely under *American Pipe*. It explained that the "theoretical basis" of *American Pipe* was that "members of the asserted class are treated for limitations purposes as having instituted their own actions." *Id.* at 255. Accordingly, "at least so long as they continue to be members of the class, the limitations period does not run against them during that time." *Id.* That conclusion did "not undermine the purposes of statutes of limitations," because "the initiation of a class action puts the defendants on notice of the claims against them." *Id.* At the same time, the "*American Pipe* tolling doctrine was created to protect class members from being *forced* to file individual suits in order to preserve their claims" not to "induce class members to forgo their right to sue individually." *Id.* at 256.

In contrast, *IndyMac* precluded petitioner from following the same course in this case because it is governed by a statute of repose rather than a statute of limitations. Pet. App. 3a.

4. The Ninth Circuit Has Held Statutes Of Limitations Are No Bar, But Has Not Addressed Statutes Of Repose.

Finally, the Ninth Circuit has held that *American Pipe* applies to toll a statute of limitations

in a case like this but has not addressed whether the same rule applies to a statute of repose. *See In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1008-09 (9th Cir. 2007).

III. This Case Presents The Court An Unparalleled Vehicle To Resolve These Important Questions That Have Bedeviled The Courts Of Appeals.

This case presents this Court an exceptional opportunity to resolve the two related and important questions this petition presents.

A. The Questions Presented Are Important.

As the expanding circuit conflicts demonstrate, the need for this Court's review has only intensified in the two-and-a-half years since it granted certiorari in *IndyMac*. During that short time, *American Pipe*'s applicability to periods of repose has determined the outcome in numerous securities cases, some of which involve alleged frauds that inflicted massive injuries on the public. *See, e.g.*, *Dusek*, 2016 WL 4205857, at *1, *5 (arising out of Madoff Ponzi scheme); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MDL 2262 NRB, 2015 WL 6243526, at *4, *138 (S.D.N.Y. Oct. 20, 2015) (arising out of LIBOR manipulation); *In re BP*, 2014 WL 4923749, at *2, *4 (arising out of Deepwater Horizon disaster).[10] The

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[10] *See also, e.g.*, *Dekalb Cty. Pension Fund v. Transocean Ltd.*, 817 F.3d 393, 413-14 (2d Cir. 2016), *petition for cert. docketed*, 16-206 (Aug. 15, 2016); *SRM Glob. Master Fund Ltd. P'ship v. Bear Stearns Cos.*, No. 14-507-cv, 2016 WL 3769735, at

Second Circuit hears a disproportionate number of those cases, increasing the need for prompt correction of its erroneous rule.[11]

The harmful consequences of *IndyMac* in the circuits that follow its rule is reason enough to grant review. But the lingering uncertainty for litigants in other circuits that have not yet decided whether *American Pipe* applies to statutes of repose is just as untenable. In those jurisdictions, potential securities plaintiffs are forced to guess whether they must file their own protective lawsuits to safeguard against the possibility that class certification in a pending action will be denied (or granted, then overruled on appeal) after the limitations period has run. If they guess wrong, genuine injuries and blatant frauds may go unaddressed. If they act conservatively, they will burden the courts with duplicative pleadings and redundant briefing that serve no real-world purpose.

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*2 (2d Cir. July 14, 2016); *Friedman v. JP Morgan Chase & Co.*, No. 15-cv-5899 (JGK), 2016 WL 2903273, at *9 (S.D.N.Y. May 18, 2016), *appeal docketed*, No. 16-1913 (2d Cir. June 15, 2016); *Dusek v. JPMorgan Cha e & Co.*, 132 F. Supp. 3d 1330, 1350 (M.D. Fla. 2015); *N. Sound Capital LLC v. Merck & Co.*, Nos. 3:13-cv-7240 (FLW)(DEA), 3:14-cv-7241 (FLW)(DEA), 3:13-cv-242 (FLW)(DEA) & 3:14-cv-241 (FLW)(DEA), 2015 WL 5055769, at *6-8 (D.N.J. Aug. 26, 2015); *In re Regions Morgan Keegan Sec., Derivative & ERISA Litig.*, Nos. 2:13-cv-02841-SHM-dkv & 2:09-2009-SHM-dkv, 2015 WL 10713983, at *3 (W.D. Tenn. July 31, 2015). *Prudential Ins. Co. of Am. v. Bank of Am., Nat'l Ass'n*, 14 F. Supp. 3d 591 (D.N.J. 2014); *Nat'l Credit Union Admin. Bd. v. Morgan Stanley & Co.*, No. 13 Civ. 6705(DLC), 2014 WL 241739, at *7 (S.D.N.Y. Jan. 22, 2014).

[11] *See* Starykh & Boettrich, *Recent Trends*, *supra*, at 9.

The passage of time has also reinforced that further percolation would serve no purpose and only exacerbate the harms caused by the present circuit conflict. The Eleventh Circuit's recent decision, for example, did little more than recite the conflicting reasoning of the courts in the split and pick a side. *See Dusek*, 2016 WL 4205857, at *3-5.

B. This Case Presents An Exceptional Vehicle To Resolve Both Circuit Conflicts.

This case presents an opportunity to resolve both circuit splits arising from the continuing uncertainty about the scope and nature of *American Pipe*'s rule. The facts of the case squarely present both questions, as petitioner filed its individual suit prior to class certification but more than three years after the securities were offered to the public. The suit was dismissed only because the Second Circuit refused to either toll the limitations period or find it satisfied by the timely filed class action. Pet. App. 3a-5a. Moreover, petitioner presented, and the Second Circuit squarely decided, both questions. *Id.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Darren J. Robbins
Joseph D. Daley
ROBBINS GELLER
RUDMAN
& DOWD LLP
655 West Broadway
Suite 1900
San Diego, CA 92101

Thomas C. Goldstein
Counsel of Record
Kevin K. Russell
Tejinder Singh
GOLDSTEIN &
RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Washington, DC 20814
(202) 362-0636
tg@goldsteinrussell.com

September 22, 2016

APPENDIX

APPENDIX A

15-1879-cv
In re Lehman Bros. Sec. & ERISA Litig.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 8th day of July, two thousand sixteen.

PRESENT: RALPH K. WINTER,
RICHARD C. WESLEY,
GERARD E. LYNCH,
Circuit Judges.

IN RE LEHMAN BROTHERS SECURITIES AND ERISA LITIGATION,

No. 15-1879

FOR APPELLANT:

THOMAS C. GOLDSTEIN, Goldstein & Russell, P.C., Bethesda, MD (Joseph D. Daley, Robbins Geller Rudman & Dowd LLP, San Diego, CA; Amanda M. Frame, Robbins Geller Rudman & Dowd LLP, San Francisco, CA, *on the brief*).

FOR APPELLEE:

VICTOR L. HOU (Mitchell A. Lowenthal, Roger A. Cooper, Jared Gerber, *on the brief*), Cleary Gottlieb Steen & Hamilton LLP, New York, NY.

Appeal from the United States District Court for the Southern District of New York (Kaplan, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the orders of the District Court are **AFFIRMED**.

The California Public Employees' Retirement System ("CalPERS") appeals from two orders of the United States District Court for the Southern District of New York (Kaplan, *J.*), which dismissed certain of CalPERS's claims as time-barred by the three-year

statute of repose contained in section 13 of the Securities Act of 1933, 15 U.S.C. § 77m. We assume the parties' familiarity with the underlying facts and the procedural history, which we reference only as necessary to explain our conclusions.

The crux of the appeal is whether the Supreme Court's decision to toll statutes of limitation for putative class members—generally referred to as "*American Pipe* tolling" after the originating case, *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974)—also applies to section 13's statute of repose. We have held previously that *American Pipe* tolling does not affect the statute of repose embodied in section 13. *See Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013). Undaunted, CalPERS urges us to distinguish this case from IndyMac. We are unpersuaded.

CalPERS argues principally that, unlike in *IndyMac*, the putative class action was commenced by a named plaintiff with proper standing and, therefore, its claims were actually asserted within the three-year statute of repose. This argument is inconsistent with the reasoning of *IndyMac*. *IndyMac* made no reference to the standing of named plaintiffs when it concluded that *American Pipe* tolling did not apply to section 13's statute of repose; its conclusion was instead derived from two longstanding principles. First, if *American Pipe* is grounded in equity, its tolling rule cannot affect a legislatively enacted statute of repose. *See IndyMac*, 721 F.3d at 109 (citing *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991)). Second, if

American Pipe establishes a "legal" tolling principle grounded in Rule 23, to apply it to a statute of repose would violate the Rules Enabling Act by permitting a procedural rule to abridge the substantive rights created by statutes of repose. *Id.* at 106, 109. Accordingly, under *IndyMac*'s reasoning, the inapplicability of *American Pipe* tolling to a statute of repose turns on the nature of the tolling rule and its ineffectiveness against statutes of repose, not whether the named plaintiffs have proper standing to assert claims on behalf of a class. *See also CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2187 (2014) ("[A] critical distinction between statutes of limitations and statutes of repose is that a repose period is fixed and its expiration will not be delayed by estoppel or tolling." (internal quotation marks omitted)).

CalPERS suggests that because it fell within the putative class before exercising its right to opt out, its claims were essentially "filed" against the defendant within three years and therefore timely. Again, we are not persuaded. As a fundamental matter, if it were true that a putative class member's claims were essentially "filed" in the putative class complaint, there would be no need for *American Pipe* tolling at all; any putative class complaint would count as a legitimate "filing" of all putative class members' claims within the limitations period. The very principle of tolling is to permit claims *not* timely asserted to proceed if the requirements for suspending the limitations period are met. *Cf. Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1231–32 (2014); *Honda v. Clark*, 386 U.S. 484, 496–97 (1967). To the

extent that CalPERS argues that *American Pipe* tolling should be conceptualized as something other than "tolling" as that term is generally understood, that argument was presented to the *IndyMac* panel, which declined to adopt it. *See* Joint Br. & Special App. for Intervenors-Appellants at 21–23, 25, *IndyMac*, No. 11-2998 (2d Cir. Nov. 2, 2011), ECF No. 116.

CalPERS finally argues that to find its claims to be time-barred violates the due process considerations embodied in Rule 23's opt-out mechanism. We are unpersuaded. The due process protections of Rule 23 are directed at preventing a putative class member from being bound by a judgment without her consent. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175–76 (1974). In essence, the optout right merely ensures that each putative class member retains the ability to act independently of the class action if she so elects. *Cf. In re WorldCom Sec. Litig.*, 496 F.3d 245, 256 (2d Cir. 2007). The opt-out right does not confer *extra* benefits to a plaintiff's independent action. CalPERS's right to initiate and pursue an individual action before, during, and after the putative class action was unchanged—including the necessity of instituting such an action within section 13's three-year statute of repose.

In closing, we note that the question whether *American Pipe* tolling applies to statutes of repose—and if so, when—may be ripe for resolution by the Supreme Court. Our decision in *IndyMac* created a circuit split with the Tenth Circuit, *see Joseph v. Wiles*, 223 F.3d 1155, 1166–68 (10th Cir. 2000), and

the issue implicates the very nature of *American Pipe* tolling, a question the Supreme Court is in the best position to resolve. Indeed, the Court initially granted certiorari to review *IndyMac* itself, *see Pub. Emps. Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, 134 S. Ct. 1515 (2014), but dismissed the writ as improvidently granted, *see* 135 S. Ct. 42 (2014), two weeks after a motion for settlement approval was filed in the district court, *see In re IndyMac MBS Litig.*, No. 09 Civ. 4586 (S.D.N.Y. Sept. 11, 2014), ECF No. 532. However, unless and until the Supreme Court informs us that our decision was erroneous, *IndyMac* continues to be the law of the Circuit and its reasoning controls the outcome of this case.

We have considered all of Appellant's arguments and find them to be without merit. For the reasons stated above, the orders of the District Court are **AFFIRMED**.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re:

LEHMAN BROTHERS SECURITIES AND ERISA LITIGATION

This document applies to:

The California Public Employees' Retirement System v. Richard S. Fuld, Jr, et al., 11 Civ. 1281 (LAK)

PRETRIAL ORDER NO. 73
***(Calpers-* Response to Pretrial Order No. 70)**

LEWIS A. KAPLAN, *District Judge.*

The Bank Defendants' motion to dismiss the complaint (MDL Dkt. 557 and 11 Civ. 1281 Dkt. 28) is reinstated and granted as to all Securities Act claims for all securities except those issued in the May 2008 offering substantially for the reasons stated in movants' response to Pretrial Order No. 70 (MDL Dkt. 1265 and 11 Civ. 1281 Dkt 112).

SO ORDERED.

Dated: August 9, 2013

/s/ Lewis A. Kaplan
Lewis A. Kaplan
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re:

LEHMAN BROTHERS SECURITIES AND ERISA LITIGATION

This document applies to:

The California Public Employees' Retirement System v. Richard S. Fuld, Jr, et al., 11 Civ. 1281 (LAK)

PRETRIAL ORDER No. 39
(HVB Motion to Dismiss)

LEWIS A. KAPLAN, *District Judge.*

Plaintiff California Public Retirement System ("CalPERS"), in its second amended complaint ("SAC"),[1] asserts a single claim against HVB Capital Markets Inc. ("HVB") under Section 11 of the Securities Act of 1933 (the "Securities Act"). HVB moves to dismiss the claim,[2] arguing that it is (1)

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[1] DI 551.

[2] DI 598, at 3.

time-barred, and (2) premised on allegations previously dismissed by the Court in its opinion dismissing in part the related class action complaint in *In re Lehman Brothers Equity/Debt Securities Litigation ("E/D Class Action").*[3]

Plaintiffs Section 11 claim against HVB is based on HVB's alleged participation in two offerings, dated July 12, 2007, and December 17, 2007.[4] CalPERS filed its original complaint on February 25, 2011.[5] Plaintiffs Section 11 claim against HVB is thus barred by the Securities Act's three-year statute of repose.[6]

Plaintiff argues that the filing of the amended complaint in the *E/D Class Action* on October 27, 2008 tolled the statute of repose under *American Pipe & Construction Co. v. Utah.*[7] It claims that its Section 11 claim against HVB therefore is timely. Plaintiff is incorrect.

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[3] *In Re Lehman Brothers Sec. and ERISA Litig.,799* F. Supp.2d 258 (S.D.N.Y. 2011) (hereinafter *"E/D Class Action I"*).

[4] ¶ 38; DI 705, at 5.

[5] DI 1 in 11 Civ. 1281.

[6] 15 U.S.C. § 77m.

[7] 414 U.S. 538.

This Court previously has held that *American Pipe* tolling does not apply to the statute of repose set forth in Section 13 of the Securities Act,[8] which clearly states that "[i]n no event shall any ... action be brought to enforce a liability created under [Section 11] more than three years after the security was bona fide offered to the public."[9] Plaintiff attempts to distinguish this Court's prior rulings by pointing out that they involved cases in which proposed intervenors attempted to cure standing defects of named plaintiffs.[10] By contrast, in this action, CalPERS - at one time a member of the putative class that had standing to sue - later opted out of the class action. This distinction, plaintiff argues, renders the Court's prior determination that *American Pipe* tolling does not apply to Section 13's statute of repose inapplicable here.

Plaintiff's argument merits little discussion. "[N]either *American Pipe* nor any other form of tolling may be invoked to avoid the three year statute of repose set forth in Section 13 of the Securities

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[8] *In re Lehman Bros. Sec. & Erisa* Litig., 800 F. Supp. 2d 477, 482 (S.D.N.Y. 2011); *In re IndyMac Mortgage-Backed Sec.* Litig., 793 F. Supp. 2d 637, 643 (S.D.N.Y. 2011).

[9] 15 U .S.C. § 77m.

[10] DI 705, at 6-7.

Act."[11] Section 13 "states quite clearly that' [i]n no event' shall ... claims be asserted 'more than three years after' the pertinent offerings. That language is absolute."[12] Nowhere in the statute is there an exception for claims brought by a plaintiff who has opted out of a class action.[13] And, given the frequency with which opt-out actions are filed in situations such as this one, such an exception would seriously undermine the statute and threaten to swallow the rule. The Court declines so to limit its prior rulings on this issue.

Because plaintiff brought its Section 11 claim against HVB more than three years after the

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[11] *E/D Class Action I,* 799 F. Supp.2d at 310.

[12] *In re Lehman,* 800 F. Supp. 2d at 477 (quoting 15 U.S.C. § 77m).

[13] Moreover, despite plaintiffs contention to the contrary, the fact that the named plaintiffs in the Court's prior decisions on this issue lacked standing had no bearing on the Court's analysis in those cases. The Court simply applied the statute as written and found that it is not subject to *American Pipe* tolling. *See In re Lehman,* 800 F. Supp. 2d at 482-83; *In re IndyMac,* 793 F. Supp. 2d at643.

securities over which it sues were offered to the public, its claim is untimely and must be dismissed.[14]

Conclusion

HVB's motion to dismiss [DI 596] - to the extent it is asserted against the SAC in this case - is granted. This ruling, however, disposes only of HVB's motion to dismiss CaLPERS' complaint as against it.

SO ORDERED.

Dated: October 15, 2012

/s/ Lewis A. Kaplan
Lewis A. Kaplan
United States District Judge

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[14] The motion is directed also at cases and pleadings that are not dealt with in this order and to that extent remains pending.

No. 16-373

In the Supreme Court of the United States

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM,

Petitioner,

v.

MOODY INVESTORS SERVICE, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Victor L. Hou
Counsel of Record
(admission pending)
Mitchell A. Lowenthal
Jared Gerber
Abena Mainoo
Anthony M. Shults
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
(212) 225-2000
vhou@cgsh.com

Counsel for Certain Respondents

November 23, 2016

QUESTIONS PRESENTED

Section 13 of the Securities Act of 1933 establishes a one-year statute of limitations and an absolute three-year statute of repose for private actions commenced under its provisions. 15 U.S.C. § 77m. In *CTS Corporation v. Waldburger*, 134 S. Ct. 2175, 2183 (2014), the Court observed that a "central distinction between statutes of limitations and statutes of repose" is that "[s]tatutes of repose . . . generally may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff's control."

The questions presented here are:

1. Whether the United States Court of Appeals for the Second Circuit correctly held, in a ruling that has been adopted by every circuit to consider the issue since *CTS*, that the Securities Act's statute of repose is not subject to the "tolling rule" established in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554–55 (1974), which provides that "the commencement of a class action suspends the applicable *statute of limitations* as to all asserted members of the class." (Emphasis added).

2. Whether the Court should adopt a novel interpretation of *American Pipe*'s tolling rule—by holding "no tolling [i]s required" where "claims" are "initially presented within the limitations period by the Class Action complaint and then maintained continuously thereafter," Pet. 26—notwithstanding that no circuit has so held and the plain text of Section 13's statute of repose requires an "action [to] be brought" within three years, rather than merely a "claim" to be "presented." 15 U.S.C. § 77m.

RULE 29.6 STATEMENT

Respondent ANZ Securities, Inc. is an indirectly wholly owned subsidiary of Australia and New Zealand Banking Group Limited ("ANZ"). Upon information and belief, ANZ has no parent company, and no publicly traded company owns 10% or more of its stock.

BFA Tenedora de Acciones, S.A.U. (formerly Banco Financiero y de Ahorros, S.A.U.) ("BFA") owns 50% or more of Respondent Bankia, S.A. and BFA is wholly owned by the Fondo de Reestructuración Ordenada Bancaria, an entity overseeing the recapitalization and restructuring of the Spanish banking system. No publicly traded company owns 10% or more of Bankia, S.A.

Respondent BBVA Securities Inc. is a wholly owned subsidiary of BBVA Compass Bancshares, Inc., which is a wholly owned subsidiary of Banco Bilbao Vizcaya Argentaria, S.A. No publicly held corporation owns 10% or more of Banco Bilbao Vizcaya Argentaria, S.A.

Respondent BMO Capital Markets Corp., formerly known as Harris Nesbitt Corp., is indirectly wholly owned by Bank of Montreal. No publicly held corporation owns 10% or more of Bank of Montreal.

On November 30, 2011, Fortis Securities LLC changed its name to BNP Paribas FS, LLC. Respondent BNP Paribas FS, LLC is a wholly-owned, indirect subsidiary of BNP Paribas. BNP Paribas is a publicly traded company organized under the laws of France. BNP Paribas

has no parent company and no publicly-held corporation owns 10% or more of its shares.

Respondent BNP Paribas is a publicly traded company organized under the laws of France. BNP Paribas has no parent company and no publicly-held corporation owns 10% or more of its shares.

Respondent BNY Mellon Capital Markets, LLC (which was formerly named Mellon Financial Markets, LLC and is the successor-in-interest to BNY Capital Markets, Inc.) is a wholly owned subsidiary of The Bank of New York Mellon Corporation. No publicly held corporation owns 10% or more of The Bank of New York Mellon Corporation.

Respondent CIBC World Markets Corp. is a wholly owned subsidiary of Canadian Imperial Bank of Commerce, which is a publicly traded company. No publicly held company owns 10% or more of Canadian Imperial Bank of Commerce's stock.

Respondent Citigroup Global Markets Inc. is wholly-owned by Citigroup Financial Products Inc., which is wholly-owned by Citigroup Global Markets Holdings Inc., which is wholly-owned by Citigroup Inc.

Respondent Daiwa Capital Markets Europe Limited (f/k/a Daiwa Securities SMBC Europe Limited) is a wholly owned subsidiary of Daiwa International Holdings Inc., which is a wholly owned subsidiary of Daiwa Securities Group Inc. No publicly traded company owns 10% or more of the stock of Daiwa Securities Group Inc.

Respondent DZ Financial Markets LLC is a wholly owned subsidiary of DZ Bank AG. DZ Bank AG does not have any corporate or other parent corporation or any publicly held corporation that owns 10% or more of its stock.

Respondent HSBC Securities (USA) Inc. is wholly owned by HSBC Markets (USA) Inc., which, in turn, is wholly owned by HSBC Investments (North America) Inc., which, in turn, is wholly owned by HSBC North America Holdings Inc., which, in turn, is indirectly held by HSBC Holdings plc. Upon information and belief, no publicly traded company owns more than 10% of the stock of HSBC Holdings plc.

Respondent ING Financial Markets LLC is wholly owned by ING Financial Holdings Corporation, which, in turn, is wholly owned by ING Bank N.V., which, in turn, is wholly owned by ING Groep N.V. No publicly traded company owns more than 10% of the shares of ING Groep N.V.

The parent company of Respondent Mizuho Securities USA Inc. is Mizuho Securities Co., Ltd.; the parent company of Mizuho Securities Co., Ltd., is Mizuho Financial Group, Inc.; no publicly held corporation owns 10% or more of Mizuho Securities USA Inc.'s stock.

Respondent Muriel Siebert & Co., Inc. is a wholly owned subsidiary of Siebert Financial Corp. No publicly traded corporation owns 10% or more of Siebert Financial Corp.

Respondent nabSecurities, LLC (f/k/a National Australia Capital Markets, LLC) is a wholly owned

subsidiary of National Australia Bank Limited, a publicly traded company on the Australian Stock Exchange. As of October 31, 2015, the companies that own 10% or more of National Australia Bank Limited's stock are HSBC Custody Nominees (Australia) Limited and JP Morgan Nominees Australia Limited.

Respondent Natixis Bleichroeder Inc., now known as Natixis Securities Americas LLC, is a wholly owned subsidiary of Natixis S.A., a French publicly traded corporation. No publicly traded corporation owns more than 10% of Natixis S.A.

Respondent RBC Capital Markets, LLC (f/k/a RBC Capital Markets Corporation) is an indirect wholly-owned subsidiary of Royal Bank of Canada, which is publicly traded on the New York Stock Exchange and the Toronto Stock Exchange.

Respondent RBS Securities Inc. (formerly named Greenwich Capital Markets, Inc., incorrectly named herein as Greenwich Capital Markets a/k/a RBS Greenwich Capital) is a wholly owned subsidiary of RBS Holdings USA Inc. (formerly named Greenwich Capital Holdings, Inc.). No publicly held company owns 10% or more of RBS Securities Inc.'s stock. RBS Holdings USA Inc. is a privately held corporation that is an indirect but wholly owned subsidiary of The Royal Bank of Scotland Group plc ("RBS Group"). Other than RBS Group, no publicly held company owns 10% or more of RBS Holdings USA Inc.'s stock. No publicly held company owns 10% or more of RBS Group's stock.

Respondent RBS WCS Holding Company, the legal successor to defendant ABN AMRO Inc., is

wholly owned by The Royal Bank of Scotland N.V., which is wholly owned by RBS Holdings N.V., which is wholly owned by RFS Holdings B.V., which is approximately 97.7% owned by RBS Group. No publicly held corporation owns 10% or more of the stock of RBS Group.

Respondent Santander Investment Securities, Inc. is an indirect, wholly owned subsidiary of Banco Santander, S.A., which is a publicly traded corporation. There is no publicly traded corporation that owns more than 10% of the stock of Banco Santander, S.A.

Respondent Scotia Capital (USA) Inc. is a wholly owned subsidiary of Scotia Holdings (US) Inc. Scotia Holdings (US) Inc. is wholly owned by BNS Investments Inc., which is 100% owned by the Bank of Nova Scotia. No publicly traded company owns 10% or more of the Bank of Nova Scotia.

Respondent SG Americas Securities, LLC is a limited liability company and wholly owned by SG Americas Securities Holdings, LLC. SG Americas Securities Holdings, LLC is a wholly owned subsidiary of Société Générale, S.A., which is a publicly traded company. Upon information and belief, no other publicly held corporation owns 10% or more of Société Générale, S.A.

Respondent Sovereign Securities Corporation, LLC is a wholly owned subsidiary of Santander Bank, N.A. (formerly known as Sovereign Bank), which, in turn, is a wholly owned subsidiary of Santander Holdings USA, Inc. (formerly known as Sovereign Bancorp, Inc.), which, in turn, is wholly owned by Banco Santander, S.A., a publicly traded

corporation organized under the laws of the Kingdom of Spain. There is no publicly traded corporation that owns more than 10% of the stock of Banco Santander, S.A.

Respondent SunTrust Capital Markets Inc. (n/k/a SunTrust Robinson Humphrey, Inc.) is a wholly owned subsidiary of SunTrust Banks, Inc. As of June 10, 2015, BlackRock, Inc., a publicly traded company, beneficially owned 11.4% of the common stock of SunTrust Banks, Inc.

Respondent Utendahl Capital Partners, L.P. is a Delaware limited partnership and Utendahl Partners, L.P. is the general partner. Utendahl Partners, L.P. has no subsidiaries or affiliates that are publicly held, and no publicly held corporation owns 10% or more of the stock of Utendahl Partners, L.P.

Respondent Wachovia Securities, LLC (n/k/a Wells Fargo Advisors, LLC) is a wholly owned indirect subsidiary of Wells Fargo & Company, a publicly traded corporation organized under the laws of the State of Delaware. Berkshire Hathaway Inc. owns more than 10 percent of the shares of Wells Fargo & Company.

Respondent Wells Fargo Securities, LLC, a limited liability company organized under the laws of Delaware, is a wholly-owned subsidiary of EVEREN Capital Corp. EVEREN Capital Corp. is a wholly owned subsidiary of Wells Fargo & Company, a publicly traded corporation organized under the laws of the State of Delaware. Berkshire Hathaway Inc. owns more than 10 percent of the shares of Wells Fargo & Company.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS viii

TABLE OF AUTHORITIES xii

INTRODUCTION 1

STATEMENT OF THE CASE 3

A. The Extensive Litigation Filed By Investors In Lehman Securities 3

B. Petitioner's Individual Action And Outsized Recoveries From Multiple Defendants On Its Timely Claims 4

C. Petitioner's Decision To Opt Out Of The Substantial Class Action Settlements While On Notice That The District Court Would Dismiss Its Untimely Claims 6

D. The District Court's Dismissal Of Petitioner's Untimely Claims And The Second Circuit's Affirmance 7

TABLE OF CONTENTS (cont'd)

Page

REASONS FOR DENYING THE PETITION 9

I. THE DECISION BELOW REFUSING TO APPLY *AMERICAN PIPE* TOLLING TO A STATUTE OF REPOSE DOES NOT WARRANT REVIEW 9

A. The Post-*CTS* Consensus At The Circuit Level Accords With The Decision Below 11

B. The Outdated Tenth Circuit Decision Cited By Petitioner Does Not Create A Circuit Split And Has Been Undermined By Subsequent Authority 14

C. The Other Circuit Cases Cited By Petitioner Are Irrelevant 16

D. Given The Pendency Of Appeals In Additional Circuits Raising The Statute-Of-Repose-Tolling Issue, It Is Premature For This Court To Consider The Issue 18

E. The Second Circuit's Experience Post-*IndyMac* Dispels The Parade Of Horribles Predicted By Petitioner And Its Amici 19

TABLE OF CONTENTS (cont'd)

Page

II. THE DECISION BELOW CONCERNING THE INAPPLICABILITY OF *AMERICAN PIPE* TOLLING TO STATUTES OF REPOSE IS CORRECT 22

A. The Holding Below Is Compelled By Section 13's Text And Purpose, As Well As This Court's Precedent 23

B. Enforcing The Statute Of Repose As Written Does Not Raise Any Constitutional Questions 28

III. PETITIONER'S SECOND QUESTION DOES NOT MERIT THIS COURT'S REVIEW 29

A. The Holding Petitioner Asks The Court To Adopt Is Both Novel And Inconsistent With The Text Of Section 13 30

B. The Ancillary And Shallow Circuit Split Identified By Petitioner Does Not Warrant Review 32

C. The Issue Of Whether *American Pipe* Tolling Applies To Actions Filed Before Class Certification Was Not Raised Below 34

TABLE OF CONTENTS (cont'd)

Page

IV. THE PRESENCE OF MULTIPLE QUESTIONS IN THE PETITION MAKES THIS AN INAPPROPRIATE VEHICLE TO RESOLVE THOSE ISSUES 35

CONCLUSION 36

TABLE OF AUTHORITIES

Page

CASES

Albano v. Shea Homes Ltd. P'ship,
254 P.3d 360 (Ariz. 2011) 26–27

Am. Express Co. v. Italian Colors Rest.,
133 S. Ct. 2304 (2013) 24

Am. Pipe & Constr. Co. v. Utah,
414 U.S. 538 (1974) ..... *passim*

Appleton Elec. Co. v. Graves Truck Line, Inc.,
635 F.2d 603 (7th Cir. 1980) 16, 17

Bright v. United States,
603 F.3d 1273 (Fed. Cir. 2010) 16–17, 18, 31

California v. Rooney,
483 U.S. 307 (1987) 35

Chardon v. Fumero Soto,
462 U.S. 650 (1983) 30

Credit Suisse Sec. (USA) LLC v. Simmonds,
132 S. Ct. 1414 (2012) 16

Crown, Cork & Seal Co. v. Parker,
462 U.S. 345 (1983) 30

CTS Corp. v. Waldburger,
134 S. Ct. 2175 (2014) ..... *passim*

Dusek v. JPMorgan Chase & Co.,
832 F.3d 1243 (11th Cir. 2016) 2, 13

TABLE OF AUTHORITIES (cont'd)

Page

Glater v. Eli Lilly & Co.,
712 F.2d 735 (1st Cir. 1983) 33

Glover v. United States,
531 U.S. 198 (2001) 34–35

In re Hanford Nuclear Reservation Litig.,
534 F.3d 986 (9th Cir. 2007) 33

In re IndyMac Mortg.-Backed Sec. Litig.,
793 F. Supp. 2d 637 (S.D.N.Y. 2011) 6

In re Lehman Bros. Sec. & ERISA Litig.,
799 F. Supp. 2d 258 (S.D.N.Y. 2011) 6

In re Lehman Bros. Sec. & ERISA Litig.,
800 F. Supp. 2d 477 (S.D.N.Y. 2011) 6

In re WorldCom Sec. Litig.,
496 F.3d 245 (2d Cir. 2007) 33, 35

Irwin v. Dep't of Veterans Affairs,
498 U.S. 89 (1990) 24

Joseph v. Wiles,
223 F.3d 1155 (10th Cir. 2000) 14–15, 31

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,
501 U.S. 350 (1991) 17, 23

McClanahan v. Morauer & Hartzell, Inc.,
404 U.S. 16 (1971) 35

TABLE OF AUTHORITIES (cont'd)

Page

Menominee Indian Tribe of Wis. v. United States,
136 S. Ct. 750 (2016) 30

Merrifield v. Bd. of Cty. Comm'rs for Cty. of Sante Fe,
654 F.3d 1073 (10th Cir. 2011) 15

Ortiz v. Fibreboard Corp.,
527 U.S. 815 (1999) 29

P. Stolz Family P'ship L.P. v. Daum,
355 F.3d 92 (2d Cir. 2004) 26

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) 28

Police & Fire Ret. Sys. of the City of Detroit v. IndyMac MBS, Inc.,
721 F.3d 95 (2d Cir. 2013) 1, 7, 25

Smith v. Bayer Corp.,
564 U.S. 299 (2011) 15

Smith v. Butler,
366 U.S. 161 (1961) 35

State Farm Mut. Auto. Ins. Co. v. Boellstorff,
540 F.3d 1223 (10th Cir. 2008) 31, 33

Stein v. Regions Morgan Keegan Select High Income Fund, Inc.,
821 F.3d 780 (6th Cir. 2016) ..... *passim*

TABLE OF AUTHORITIES (cont'd)

Page

Tyson Foods, Inc. v. Bouaphakeo,
136 S. Ct. 1036 (2016) 24

United States v. Kwai Fun Wong,
135 S. Ct. 1625 (2015) 30

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011) 24

Walker v. Armco Steel Corp.,
446 U.S. 740 (1980) 24

West v. Conrail,
481 U.S. 35 (1987) 24

Wyser-Pratte Mgmt. Co. v. Telxon Corp.,
413 F.3d 553 (6th Cir. 2005) 33

Young v. United States,
535 U.S. 43 (2002) 24

STATUTES AND RULES

15 U.S.C. § 77m 1, 23, 32

28 U.S.C. § 2072(b) 24

28 U.S.C. § 2501 17

49 U.S.C. § 14705 17

Fed. R. Civ. P. 3 32

TABLE OF AUTHORITIES (cont'd)

Page

OTHER AUTHORITIES

54 C.J.S. Limitations of Actions § 7 (2010) 25

Amir Rozen, Brendan Rudolph & Christopher Harris, *Opt-Out Cases in Securities Class Action Settlements, 2012–2014 Update*, Cornerstone Research (2016) 21–22

Amir Rozen, Joshua B. Schaeffer & Christopher Harris, *Opt-Out Cases in Securities Class Action Settlements*, Cornerstone Research (2013) 21

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INTRODUCTION

Section 13 of the Securities Act of 1933 (the "Securities Act") sets forth both a statute of limitations and, separately, a statute of repose for actions asserting Securities Act claims. With respect to actions (like this one) asserting claims under Section 11, the statute of repose mandates that "[i]n no event shall any . . . action be brought to enforce a liability created under [Section 11] more than three years after the security was bona fide offered to the public." 15 U.S.C. § 77m.

Here, Petitioner—a sophisticated institutional investor, and a frequent participant in securities litigation—filed this action more than three years after some of the relevant securities were offered to the public. It nonetheless argues that its action was timely because the statute of repose should be tolled under *American Pipe & Construction Co. v. Utah*, which held that "the commencement of a class action suspends the applicable *statute of limitations* as to all asserted members of the class." 414 U.S. 538, 554–55 (1974) (emphasis added). The court below correctly rejected this argument based on its prior ruling in *Police and Fire Retirement System of the City of Detroit v. IndyMac MBS, Inc.* ("*IndyMac*"), which held that "*American Pipe*'s tolling rule does not apply to the three-year statute of repose in Section 13." 721 F.3d 95, 101 (2d Cir. 2013).

Petitioner now asks the Court to review that decision on two grounds, neither of which the Court should accept. *First*, Petitioner asks the Court to decide whether statutes of repose are subject to

American Pipe tolling, which is an issue the Court previously agreed to consider in *IndyMac* before dismissing the writ as improvidently granted. But Petitioner's assumption that the Court should review that question here because it agreed to do so before ignores the significant developments that have occurred since *IndyMac* was dismissed. Most importantly, the Court recently provided significant guidance on the "distinct purpose[s]" of statutes of limitations and statutes of repose, including that statutes of repose "will not be tolled for any reason." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014). Since that decision, every circuit court that has considered the question presented here has reached the same conclusion as the Second Circuit. *See Dusek v. JPMorgan Chase & Co.*, 832 F.3d 1243 (11th Cir. 2016); *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F.3d 780 (6th Cir. 2016).[1] In light of this emerging consensus—as well as the undermined rationale of the one potentially contrary Tenth Circuit decision from 16 years ago, the presence of pending appeals before other circuits raising the same issue, and the limited impact of the decision below—the Court should allow this question to continue to develop at the circuit level rather than intercede now.

Second, Petitioner asks the Court to grant review so that it can adopt a novel interpretation of

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[1] *Dusek* is also the subject of a pending petition. *See* Pet. for Cert., *Dusek v. JPMorgan Chase & Co.*, No. 16-389 (filed Sept. 26, 2016). Two additional petitions from other Second Circuit rulings are also pending. *See* Pet. for Cert., *SRM Glob. Master Fund v. The Bear Stearns Cos.*, No. 16-372 (filed Sept. 22, 2016); Pet. for Cert., *DeKalb Cty. Pension Fund v. Transocean Ltd.*, No. 16-206 (filed Aug. 12, 2016).

American Pipe by holding that *American Pipe*'s tolling rule does not involve tolling in certain circumstances. Petitioner claims that such a decision could resolve an ancillary circuit split concerning whether absent class members who file suit before a class certification decision are entitled to the benefit of *American Pipe* tolling. The Court should likewise decline to review this question for several reasons, including that no circuit court has adopted the interpretation of *American Pipe* that Petitioner proposes, the ancillary circuit split identified by Petitioner is shallow and poised to resolve itself, and the issue underlying that circuit split was not raised below (because the Second Circuit's position in fact favors Petitioner).

Finally, the presence of multiple, independent questions makes this case an improper vehicle to consider any of the issues presented.

Accordingly, the petition should be denied.

STATEMENT OF THE CASE

A. The Extensive Litigation Filed By Investors In Lehman Securities

In the months before the bankruptcy of Lehman Brothers Holdings Inc. ("Lehman"), the company's common stock declined in value. As a result, beginning on June 18, 2008, several class actions were filed by investors in Lehman's common stock asserting securities fraud claims under Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") against Lehman and certain of its officers and directors. Those class actions were consolidated into a multi-district litigation in the

Southern District of New York (the "Class Action"). *See* Dkt. No. 1 in 09-md-2017-LAK-GWG (S.D.N.Y. Jan. 9, 2009).

On September 15, 2008, Lehman filed for bankruptcy protection. Soon thereafter, several additional class actions asserting Securities Act claims were filed by investors in Lehman debt securities against additional defendants, including for the first time the entities that purportedly underwrote those offerings. These actions were consolidated with the Class Action. *See* Dkt. Nos. 1, 30 in 09-md-2017-LAK-GWG (S.D.N.Y.). Petitioner was a member of the putative class with respect to certain of the notes at issue, but did not move to be appointed lead plaintiff.

As early as November 2008, other investors in Lehman securities who were members of the putative class began filing individual actions. *See Zenith Ins. Co. v. Fuld*, No. 09-cv-1238-LAK (S.D.N.Y. Nov. 19, 2008). Over time, more than a dozen such individual actions were filed and coordinated with the Class Action.

B. Petitioner's Individual Action And Outsized Recoveries From Multiple Defendants On Its Timely Claims

On February 7, 2011, while the Class Action remained pending and before the class plaintiffs had even filed a class certification motion, Petitioner filed this individual action in the Northern District of California (even though the Class Action was pending in the Southern District of New York). In addition to bringing the claims at issue here—Securities Act claims concerning

several Lehman notes that were issued more than three years earlier (the "Untimely Claims")—Petitioner's complaint asserted Securities Act claims against other underwriter defendants about one offering of Lehman notes that took place less than three years before it brought this action, as well as Exchange Act claims, which are subject to a longer statute of repose, against other non-underwriter defendants concerning Petitioner's investments in Lehman's common stock (the "Timely Claims"). As to the Timely Claims, there was no dispute that Petitioner's complaint was timely filed, and Petitioner settled those claims.

Although Petitioner's decision to file this action prior to a class certification motion demonstrates it never had any interest in participating in the Class Action, Petitioner nonetheless sought to benefit from the Class Action by asserting that its action, insofar as it asserts the Untimely Claims, was timely under the Securities Act's three-year statute of repose because those claims were "tolled by the pending class action." Dkt. No. 1-1 at 52 in No. 11-cv-01281-LAK (S.D.N.Y. Feb. 7, 2011).

Petitioner's decision to pursue a separate individual action paid off handsomely with respect to the Timely Claims: it settled with Lehman's officers and directors for $11 million (in contrast to the class recovery of $90 million from those individuals) and with Lehman's auditor for $12.75 million (in contrast to the $99 million received by the class). In addition, Petitioner settled its Securities Act claims concerning the note offering that occurred less than three years before this action was filed for over $4.6 million. Indeed,

Petitioner itself touted in a press release that its recovery was "far larger than the recovery [it] would have obtained had it remained in the class action." Press Release, CalPERS, *CalPERS Achieves $12.75M Recovery from Ernst & Young LLP* (May 5, 2014), https://www.calpers.ca.gov/page/newsroom/calpers-news/2014/ernst-young.

C. Petitioner's Decision To Opt Out Of The Substantial Class Action Settlements While On Notice That The District Court Would Dismiss Its Untimely Claims

On April 13, 2011, the District Court overseeing the coordinated Lehman securities litigation issued a decision holding "that statutes of repose, including the three-year period established by Section 13 of the Securities Act, are not tolled by the pendency of putative class actions." *In re Lehman Bros. Sec. & ERISA Litig.*, 800 F. Supp. 2d 477, 481 (S.D.N.Y. 2011). The District Court subsequently reaffirmed that holding in two later decisions issued in 2011. *See In re Lehman Bros. Sec. & ERISA Litig.*, 799 F. Supp. 2d 258, 310 (S.D.N.Y. 2011); *In re IndyMac Mortg.-Backed Sec. Litig.*, 793 F. Supp. 2d 637, 642 (S.D.N.Y. 2011). Citing these decisions, on January 6, 2012, Respondents moved to dismiss the Untimely Claims.

As such, when Petitioner formally opted out of the underwriter defendants' $426 million class action settlement in March 2012 (by submitting the formal notice required by the District Court), it was on notice that the District Court would dismiss the claims at issue here as time-barred. Petitioner

nonetheless assumed that risk and gambled that the District Court's decision would be overturned, which would allow Petitioner to pursue an individual recovery in excess of what it would have received in the class.

D. The District Court's Dismissal Of Petitioner's Untimely Claims And The Second Circuit's Affirmance

On October 15, 2012, the District Court granted the motion to dismiss filed by one Respondent, HVB Capital Markets, Inc., after again reaffirming its prior holding "that *American Pipe* tolling does not apply to the statute of repose set forth in Section 13 of the Securities Act." Pet.App.11a. However, the District Court subsequently deferred ruling on the statute-of-repose arguments raised by the remaining Respondents because the tolling issue was then being considered by the Second Circuit.

On June 27, 2013, the Second Circuit issued its decision in *IndyMac*, holding that "*American Pipe*'s tolling rule does not apply to the three-year statute of repose in Section 13." 721 F.3d at 101. After considering supplemental briefing regarding *IndyMac*, the District Court dismissed Petitioner's Untimely Claims as time-barred. Pet.App.7a. Petitioner then appealed to the Second Circuit.

On appeal, Petitioner did not argue that *IndyMac* was wrongly decided, and instead attempted to distinguish *IndyMac* on the ground that, unlike in *IndyMac*, the named plaintiffs in the Class Action here had standing to assert Petitioner's claims. (In its petition, Petitioner has

abandoned this argument.) Petitioner further argued that applying *IndyMac* to plaintiffs pursuing individual claims would violate their due process rights to opt out of class actions.

On July 8, 2016, the Second Circuit affirmed the District Court's decisions, rejecting both of Petitioner's arguments. Pet.App.A. With respect to Petitioner's argument that *IndyMac* should not apply where the class plaintiffs possess standing, the Second Circuit stressed that *IndyMac* made no reference to the class plaintiffs' standing or lack thereof. Pet.App.3a. Rather, the Second Circuit recognized that *IndyMac*'s holding that *American Pipe* tolling does not apply to Section 13's repose period was based on "two longstanding principles" that had nothing to do with standing:

> First, if *American Pipe* is grounded in equity, its tolling rule cannot affect a legislatively enacted statute of repose. Second, if *American Pipe* establishes a "legal" tolling principle grounded in Rule 23, to apply it to a statute of repose would violate the Rules Enabling Act by permitting a procedural rule to abridge the substantive rights created by statutes of repose.

Pet.App.3a–4a. The Second Circuit supported this ruling, in part, by citing this Court's post-*IndyMac* decision in *CTS* for the proposition that "a repose period is fixed and its expiration will not be delayed by estoppel or tolling." Pet.App.4a.

Finally, with respect to Petitioner's argument that dismissing its action as untimely would violate the due-process principles underlying Rule 23's opt-out mechanism, the Second Circuit was "unpersuaded" because "[t]he due process protections of Rule 23 are directed at preventing a putative class member from being bound by a judgment without her consent" and they "do[] not confer *extra* benefits to a plaintiff's independent action." Pet.App.5a. In other words, Petitioner's "right to initiate and pursue an individual action before, during, and after the putative class action was unchanged—including the necessity of instituting such an action within section 13's three-year statute of repose." *Id.*

At no point before the District Court or the Second Circuit did Petitioner (or any other party) argue that Petitioner's filing of this action prior to class certification was relevant to the issue of whether it was entitled to tolling, and neither the District Court nor the Second Circuit addressed that issue.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW REFUSING TO APPLY *AMERICAN PIPE* TOLLING TO A STATUTE OF REPOSE DOES NOT WARRANT REVIEW

Petitioner's central justification for granting review here is that the Court previously agreed in *IndyMac* to review the question of whether *American Pipe* tolling applies to statutes of repose. (Subsequently, however, the writ was dismissed as improvidently granted.)

Petitioner's assumption that this issue still merits review ignores the significant developments in this area since *IndyMac* was dismissed. These developments include: (1) the Court's subsequent decision in *CTS*, which provided important guidance on the distinctions between statutes of limitations and statutes of repose; (2) the unbroken string of post-*CTS* decisions at the circuit level holding that statutes of repose are not subject to *American Pipe* tolling; (3) a number of appeals pending before additional circuit courts that raise the same issue; and (4) the Second Circuit's three years of experience with *IndyMac*, which affirmatively dispel the alarmist predictions made by the *IndyMac* petitioners.

Rather than "increas[ing] the need" for review, Pet. 10, these developments demonstrate the opposite.[2] Since *CTS*, every circuit court to consider whether *American Pipe* tolls statutes of repose has agreed with *IndyMac* that it does not. These circuit court opinions, coupled with the additional circuits in which the issue has already been presented, include all circuits where securities class actions are regularly filed. Thus, any need for this Court to review the issue now—in order to avoid the much-hyped, but still phantom, negative consequences of the *IndyMac* decision—has been obviated.

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[2] In commenting that the statute-of-repose-tolling issue "may be ripe for resolution by the Supreme Court," Pet.App.5a, the court below did not consider these factors. Indeed, the Eleventh Circuit's decision in *Dusek* was released after the decision below, and the Sixth Circuit's decision in *Stein* was released after briefing was completed.

A. The Post-*CTS* Consensus At The Circuit Level Accords With The Decision Below

Shortly after dismissing *IndyMac*, the Court issued its decision in *CTS*, which was the first time that it discussed at length the significant differences between statutes of limitations and statutes of repose. After the guidance provided in *CTS*, every circuit court to address the issue raised in *IndyMac* has agreed with the Second Circuit's holding.

CTS addressed the question of whether a federal statute that "pre-empts statutes of limitations . . . also pre-empts state statutes of repose." 134 S. Ct. at 2180. In resolving that question, the Court noted that "[s]tatutes of limitations and statutes of repose both are mechanisms used to limit the temporal extent or duration of liability for tortious acts." *Id.* at 2182. However, the Court recognized that "the time periods specified are measured from different points, and the statutes seek to attain different purposes and objectives." *Id.*

In contrast to a statute of limitations, which "creates a time limit for suing in a civil case, based on the date when the claim accrued," a statute of repose "puts an outer limit on the right to bring a civil action" that "is measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant." *Id.* This difference is driven by the "distinct purpose[s]" of the two types of statutes. *Id.* at 2183. While statutes of limitations are intended to "require plaintiffs to pursue diligent prosecution

of known claims" and to "promote justice by preventing surprises through plaintiffs' revival" of stale claims, statutes of repose "effect a legislative judgment that a defendant should be free from liability after a legislatively determined period of time." *Id.* In other words, unlike statutes of limitations, statutes of repose are "equivalent to a cutoff" and "can be said to provide a fresh start or freedom from liability." *Id.*

Perhaps most significantly for the issue presented here, the Court also specifically identified "[o]ne central distinction between statutes of limitations and statutes of repose [that] underscores their differing purposes": unlike statutes of limitations, which "are subject to equitable tolling," statutes of repose "generally may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff's control." *Id.* This is so because the "main thrust" of a statute of limitations "is to encourage the plaintiff to pursue his rights diligently, and when an extraordinary circumstance prevents him from bringing a timely action, the restriction imposed by the statute of limitations does not further the statute's purpose," whereas "a statute of repose is a judgment that defendants should be free from liability after the legislatively determined period of time, beyond which the liability will no longer exist and will not be tolled for any reason." *Id.*

As Petitioner admits, Pet. 15–16, since the Court dismissed *IndyMac* and decided *CTS*, both the Sixth and the Eleventh Circuits have joined with the Second Circuit in holding that *American Pipe* tolling does not apply to statutes of repose.

In *Stein*, the Sixth Circuit acknowledged the potentially conflicting pre-*CTS* decisions from the Second and Tenth Circuits on the statute-of-repose-tolling issue, and ultimately held that *IndyMac* presented "the more cogent and persuasive rule." 821 F.3d at 793. In reaching that result, *Stein* stressed that *CTS* "recently clarified the distinctions between" statutes of limitations and repose, and concluded that *IndyMac* was "more consistent with" *CTS*. *Id.* at 786, 793. *Stein* thus rejected the Tenth Circuit's nearly two-decade-old and arguably contrary holding, which the Sixth Circuit reiterated was "expressed prior to *CTS*." *Id.* at 794.

Subsequently, the Eleventh Circuit in *Dusek* held that the Exchange Act's statute of repose is not subject to *American Pipe* tolling. As in *Stein*, *Dusek* began its analysis by highlighting that *CTS* "discussed at length the difference between statutes of limitation and statutes of repose." 832 F.3d at 1247. The Eleventh Circuit also discussed the potentially conflicting Second and Tenth Circuit decisions, as well as *Stein*, and stated that the Sixth Circuit's interpretation of *CTS* "provided a well-reasoned discussion of why the Rules Enabling Act would prohibit tolling of a statute of repose." *Id.* at 1247–49. *Dusek* then joined with the Sixth and Second Circuits in rejecting the Tenth Circuit's pre-*CTS* holding.

As a result of this Court's decision in *CTS*, and the uniform adoption of the Second Circuit's holding by all of the circuits to subsequently address the issue, any limited circuit split that

existed when the Court accepted the petition in *IndyMac* has only become more shallow.

B. The Outdated Tenth Circuit Decision Cited By Petitioner Does Not Create A Circuit Split And Has Been Undermined By Subsequent Authority

The Tenth Circuit's decision in *Joseph v. Wiles*, 223 F.3d 1155 (10th Cir. 2000), is the sole case involving a statute of repose that Petitioner identifies as conflicting with the Second, Sixth, and Eleventh Circuits' holdings. Even that decision, however, does not raise a direct conflict with the other circuit courts and, even if it did, it would be an outlier whose reasoning has been undermined by subsequent authority.

In *Joseph*, the Tenth Circuit held that this Court's statements prohibiting the equitable tolling of statutes of repose did not apply to *American Pipe* after reasoning that *American Pipe* tolling was so-called "legal tolling," apparently derived from a Rule 23 penumbra, rather than traditional equitable tolling. *Id.* at 1166–67. The Tenth Circuit went on to justify this decision by stating that, "in a sense, application of the *American Pipe* tolling doctrine does not involve 'tolling' at all" because an absent class member "has effectively been a party to an action against these defendants since a class action covering him was requested but never denied." *Id.* at 1168.

Critically, however, despite founding its holding on Rule 23, the Tenth Circuit did not consider whether Rule 23 could validly support that weight in light of the Rules Enabling Act's prohibition on

abridging or modifying substantive rights. *Id.* at 1166–68. Because *Joseph* did not squarely decide this issue, a party in a future appeal before the Tenth Circuit could raise that argument, which would allow the Tenth Circuit to reach the same conclusion as the other circuits that have considered this issue. *See Merrifield v. Bd. of Cty. Comm'rs for Cty. of Sante Fe*, 654 F.3d 1073, 1084 (10th Cir. 2011) ("It is elementary that an opinion is not binding precedent on an issue it did not address."). Until the Tenth Circuit (or another circuit) holds that *American Pipe* tolling can be applied to a statute of repose without violating the Rules Enabling Act, there is no true circuit split on this issue that requires the Court's intervention.

In any event, even if *Joseph* could be read as creating an actual conflict among the circuits, that outdated decision has been so undermined by subsequent authority that the Tenth Circuit may reconsider it without this Court further addressing the issue. As discussed above, the Tenth Circuit's decision predated by more than a decade this Court's decision in *CTS*, which clarified the differences between statutes of limitations and repose, and cast serious doubt on the Tenth Circuit's ruling. *See Stein*, 821 F.3d at 793. Since *Joseph* was decided, this Court has also undermined the Tenth Circuit's reasoning that an absent class member is "effectively . . . a party" to a class action upon filing, by bluntly characterizing the argument "that a nonnamed class member is a party to the class-action litigation before the class is certified" as "novel and surely erroneous." *Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011). And, since *Joseph*, this Court has also called into doubt the

Tenth Circuit's interpretation of *American Pipe* as "legal tolling," by stating that the Court "did not employ the term" in *American Pipe* and "[t]he label attached to [a tolling] rule does not matter" where (as here) tolling is inconsistent with the underlying statute. *Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1419 n.6 (2012).[3]

C. The Other Circuit Cases Cited By Petitioner Are Irrelevant

In a further attempt to foster the appearance of a circuit split, Petitioner suggests that the Second Circuit's refusal to apply *American Pipe* tolling to statutes of repose conflicts with two earlier decisions of the Seventh and Federal Circuits applying *American Pipe* to "jurisdictional" statutes of limitations. Pet. 12–15. This effort fails.

First, it is clear that both the Seventh and the Federal Circuits addressed statutes of limitations, not statutes of repose. *See Appleton Elec. Co. v. Graves Truck Line, Inc.*, 635 F.2d 603, 610 (7th Cir. 1980) (holding that "the statute of limitations" was "tolled as to all putative members of the defendant class"); *Bright v. United States*, 603 F.3d 1273, 1290 (Fed. Cir. 2010) (holding that "[t]he statute of limitations" was "tolled during the period the Court

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[3] The Court in *CTS* further called into question the purported distinction between "legal" and "equitable" tolling by referring to a statutory provision that tolled claims for minor or incompetent plaintiffs as "provid[ing] for equitable tolling," 134 S. Ct. at 2187, notwithstanding that courts following *Joseph* would conceive of it as "legal tolling . . . on the ground that the rule is derived from a statutory source." *Simmonds*, 132 S. Ct. at 1419 n.6.

of Federal Claims allows putative class members to opt in to the class"). Petitioner seeks to blur the distinctions between the "jurisdictional" statutes of limitations at issue in *Appleton* and *Bright* and Section 13's statute of repose on the basis that "jurisdictional" statutes of limitations (like statutes of repose) are not subject to equitable tolling and their expiration "not only bars the remedy but also destroys the liability." Pet. 13. But that is where any similarities between the two types of statutes end.

Importantly, the statutes of limitations in *Appleton* and *Bright* lack the two-tiered limitations/repose structure of Section 13, which demonstrates that "the purpose of the 3-year [repose period] is clearly to serve as a cutoff." *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991). Further, the statutes of limitations in *Appleton* and *Bright* both measure the time to bring an action from "accru[al]." *See* 49 U.S.C. § 14705; 28 U.S.C. § 2501. As the Court recognized in *CTS*, it is black-letter law that statutes of limitations, but not statutes of repose, run from accrual of the cause of action. 134 S. Ct. at 2182. Thus, *Appleton* and *Bright* stand at most for the uncontroversial proposition that *American Pipe* tolling can apply to statutes of limitations.[4]

Second, neither *Appleton* nor *Bright* suggested that, in contrast to Section 13's statute of repose,

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[4] Indeed, the Seventh Circuit in *Appleton* referred to the relevant statute of limitations as "jurisdictional" only in the sense that the defendant's failure to raise a limitations defense did not result in forfeiture. 635 F.2d at 608.

the limitations periods at issue in those cases vested any substantive rights in the defendants to be free of liability. As such, neither *Appleton* nor *Bright* addressed whether tolling a "jurisdictional" statute of limitations would be consistent with the Rules Enabling Act. In fact, the Rules Enabling Act did not even apply in *Bright*, which instead considered whether tolling was appropriate under Court of Federal Claims Rule 23, a rule that is not subject to the Rules Enabling Act's prohibition on abridging or modifying substantive rights. 603 F.3d at 1276–77, 1286.

For these reasons, the Seventh and Federal Circuits' holdings that *American Pipe* tolling can apply to "jurisdictional" statutes of limitations do not conflict with the Second, Sixth, and Eleventh Circuits' holdings that *American Pipe* tolling cannot apply to statutes of repose.

D. Given The Pendency Of Appeals In Additional Circuits Raising The Statute-Of-Repose-Tolling Issue, It Is Premature For This Court To Consider The Issue

As explained above, every circuit court to consider the issue since this Court's decision in *CTS* has held that statutes of repose are not subject to *American Pipe* tolling. The issue also is subject to at least three pending appeals in the Third and Ninth Circuits. *See N. Sound Capital LLC v. Merck & Co.*, 16-1364 (3d Cir.) (oral argument held Oct. 5, 2016); *Reese v. Malone*, 16-35009 (9th Cir.); *Hildes v. Moores*, 15-55937 (9th Cir.). Indeed, Petitioner submitted an amicus brief in one of these cases, in which it stated that the issues before the court are

"closely related" to those it is "currently litigating" here. Dkt. No. 32-2 at 1, *Hildes v. Moores*, 15-55937 (9th Cir. Aug. 4, 2016).

The Court should allow these circuit courts to weigh in on the question presented before agreeing to consider it here. Should those circuit courts agree with the post-*CTS* consensus reached by the Second, Sixth, and Eleventh Circuits, those decisions would further reduce any need for this Court's review and would increase the likelihood that the Tenth Circuit would reevaluate its holding in *Joseph*. On the other hand, should the Third or Ninth Circuits disagree with that consensus, the reasoning adopted in such a decision could clarify the issues for the Court. Thus, it would be premature for the Court to resolve the question presented unless and until a circuit court departs from the unbroken line of circuit decisions since *CTS* agreeing with the decision below.

E. The Second Circuit's Experience Post-*IndyMac* Dispels The Parade Of Horribles Predicted By Petitioner And Its Amici

Finally, the Second Circuit's experience since *IndyMac* demonstrates that the dire predictions about the decision's impact on judicial economy, which were raised in the *IndyMac* certiorari briefing and are repeated by Petitioner and its amici here, are unfounded. This experience further reduces the need for the Court to immediately review the question presented.

The Court initially granted review in *IndyMac* when faced with a petition that ominously argued "the disruptive effects of the decision below will be

substantial, and they will be felt immediately." Pet. for Cert. at 19, *Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, No. 13-640 (filed Nov. 22, 2013). In particular, the *IndyMac* petition warned that "investors that are members of a putative class can be expected immediately to begin filing protective (and duplicative) actions and motions to intervene to preserve their rights," which would lead "investors to flood district courts with thousands of unnecessary and duplicative filings." *Id.* at 20–21. Based on these dire predictions, the petition admonished that "[a] change of this magnitude in federal practice, with such significance for district court dockets and the rights of litigants, warrants this Court's full and immediate consideration." *Id.* at 22–23.

Years later, Petitioner parrots these warnings, arguing that "intolerable results . . . would arise if *American Pipe* did not apply to . . . statutes of repose" and speculating that investors "will burden the courts with duplicative pleadings and redundant briefing that serve no real-world purpose." Pet. 22, 35. Petitioner's amici raise similar concerns, stating that they "envision an increase in 'protective filings'" under *IndyMac*, Ret. Judges' Amicus Br. at 2, and that "the Second Circuit's decisions impose unnecessary and costly burdens" and "prompt wasteful and unnecessary litigation that burdens all parties and the courts." States' Amicus Br. at 2.

Neither Petitioner nor its amici cite any evidence supporting these speculative concerns, notwithstanding the years that have passed since the *IndyMac* decision. In fact, an analysis of opt-out

filings in securities class actions commenced after *IndyMac* demonstrates that these dire predictions have not come to pass. A review of the dockets in the 189 securities class actions filed in the Second Circuit since its June 2013 *IndyMac* decision, *see* Stanford Law School, *Filings Database*, Securities Class Action Clearinghouse, http://securities.stanford.edu/filings.html (last visited Nov. 21, 2016), shows that only three of those class actions (or 1.59%) are marked as related to opt-out actions.[5] Notably, this post-*IndyMac* opt-out rate is actually *lower* than the opt-out rate observed in securities class actions in the years before *IndyMac* was decided. *See* Amir Rozen, Joshua B. Schaeffer & Christopher Harris, *Opt-Out Cases in Securities Class Action Settlements*, Cornerstone Research, 2 (2013) (observing that opt-out cases were filed in three percent of securities-class-action settlements reached between 1996 and 2011). Moreover, a recently released study of opt-out cases from securities class actions, including actions filed after

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[5] *See Guevoura Fund Ltd. v. Sillerman*, No. 15-cv-07192 (CM) (S.D.N.Y. Sept. 11, 2015); *Ngo v. Petroleo Brasileiro S.A. – Petrobras*, No. 14-cv-09760 (JSR) (S.D.N.Y. Dec. 10, 2014); *In re Sanofi Sec. Litig.*, No. 13-cv-08806 (PAE) (S.D.N.Y. Dec. 11, 2013). While *Petrobras* has generated a significant number of opt-outs, those appear to be driven by the perceived value of the opt-out claims rather than a desire to preserve the timeliness of those claims. *See* Amir Rozen, Brendan Rudolph & Christopher Harris, *Opt-Out Cases in Securities Class Action Settlements, 2012–2014 Update*, Cornerstone Research, 1 (2016) (noting plaintiffs are "more likely to bring opt-out cases stemming from larger class action settlements"). An additional class action, *In re: SunEdison, Inc., Securities Litigation*, 16-md-02742-PKC (S.D.N.Y.) (transferred from E.D. Mo. Oct. 6, 2016), has related opt-outs that were filed before transfer to the Second Circuit.

IndyMac, "found no discernible increase in the preponderance of opt-outs over time." Amir Rozen, Brendan Rudolph & Christopher Harris, *Opt-Out Cases in Securities Class Action Settlements, 2012–2014 Update*, Cornerstone Research, 2 (2016). Thus, the "flood" of placeholder actions predicted in the wake of *IndyMac* has not yet even produced a trickle. And, given the three-year repose period in Section 13, if a flood were coming, it should have materialized by now.[6]

In light of this evidence, the speculative consequences envisioned by Petitioner and its amici are unfounded, and the Court can defer ruling on this issue unless and until a concrete circuit split develops.

II. THE DECISION BELOW CONCERNING THE INAPPLICABILITY OF *AMERICAN PIPE* TOLLING TO STATUTES OF REPOSE IS CORRECT

The petition should be denied for the additional reason that the decision below is correct. It is consistent with, and indeed compelled by, Section 13's plain text and this Court's decision in *CTS*, which made clear that statutes of repose may not be tolled. There is thus no basis for granting review.

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[6] In any event, courts possess well-developed mechanisms to reduce the burdens of protective filings. *See* Br. for the Secs. Indus. & Fin. Mkts. Assoc. as Amicus Curiae Supporting Resp'ts at 28–29, *Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, No. 13-640 (July 24, 2014) (identifying case management techniques, including staying individual actions, appointing liaison counsel, and permitting testimony to be admissible in related actions).

A. The Holding Below Is Compelled By Section 13's Text And Purpose, As Well As This Court's Precedent

By its plain terms, Section 13 bars "any . . . action" brought under Section 11 "more than three years after the security was bona fide offered to the public." 15 U.S.C. § 77m. This includes Petitioner's action here, which even Petitioner concedes was "file[d] . . . after the relevant statute of . . . repose [applicable to the Untimely Claims] ha[d] expired." Pet. 26. For the following reasons, the court below correctly rejected Petitioner's attempts to apply *American Pipe* tolling to Section 13's statute of repose.

First, Petitioner does not dispute that if *American Pipe* tolling is considered a form of equitable tolling, it cannot be applied to a statute of repose. *See* Pet. 17–18 (arguing only that *American Pipe* did not establish a rule of equitable tolling). As the Court recognized in *Lampf* and reaffirmed in *CTS*, statutes of repose, including the three-year period in Section 13, are not subject to equitable tolling. *See CTS*, 134 S. Ct. at 2183 ("Statutes of limitations, but not statutes of repose, are subject to equitable tolling."); *Lampf*, 501 U.S. at 363 ("[I]t is evident that the equitable tolling doctrine is fundamentally inconsistent with the 1-and-3-year structure" of the federal securities laws.).[7]

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[7] Although the court below did not consider it necessary to resolve the issue, *American Pipe* tolling—which is a judicially crafted doctrine that is not set forth in any statute or rule, was motivated by considerations of "litigative efficiency and economy," and was supported by citations to cases applying

Second, even if *American Pipe* tolling were "derived not from equity, but from this Court's interpretation of Rule 23" and therefore could be considered a form of "legal" tolling, as Petitioner contends, Pet. 17, it still could not validly be applied to a statute of repose under the Rules Enabling Act.

As the Second Circuit correctly recognized, the Rules Enabling Act prohibits applying the federal rules in a way that would "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Indeed, in recent years, this Court has repeatedly declined to interpret Rule 23 in a way that would modify substantive rights. *See, e.g.*, *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046 (2016); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309–10 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011).[8]

The Second Circuit also correctly recognized that statutes of repose, unlike statutes of limitations, grant defendants a substantive right to

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equitable tolling, 414 U.S. at 554–59—is properly considered a form of equitable tolling. Indeed, this Court has referred to *American Pipe* tolling as equitable tolling on multiple occasions. *See, e.g.*, *Young v. United States*, 535 U.S. 43, 49 (2002); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 & n.3 (1990).

[8] *Compare Walker v. Armco Steel Corp.*, 446 U.S. 740, 751 (1980) (holding that, for state law claims, Rule 3 "does not affect state statutes of limitations"), *with West v. Conrail*, 481 U.S. 35, 39 (1987) (holding that, for federal law claims, Rule 3 does affect limitations periods). *See also* Mitchell A. Lowenthal & Norman Menachem Feder, *The Impropriety of Class Action Tolling for Mass Tort Statutes of Limitations*, 64 Geo. Wash. L. Rev. 532, 546–68 (1996).

be free from liability. *See IndyMac*, 721 F.3d at 106. While Petitioner questions this ruling in a footnote, Pet. 19 n.4, the treatise that this Court heavily cited in *CTS* is in full accord with the Second Circuit on this point. *See* 54 C.J.S. Limitations of Actions § 7 (2010) (cited in *CTS*, 134 S. Ct. at 2182, 2183, 2187) ("A statute of repose creates a substantive right in those protected to be free from liability after the legislatively determined period of time."). Indeed, in drawing "analogies in *CTS* between statutes of repose and the ability to discharge debts in bankruptcy or to be free of double jeopardy in criminal proceedings," this Court itself "underscored" that "statutes of repose vest a substantive right in defendants to be free of liability." *Stein*, 821 F.3d at 794.

Thus, the court below correctly held that, even if *American Pipe* tolling were a form of "legal" tolling based on Rule 23, applying it to a statute of repose would be prohibited by the Rules Enabling Act.

Finally, even if Petitioner were correct that the proper test for determining whether *American Pipe* tolling is permissible under the Rules Enabling Act is whether tolling is "consistent with the legislative purpose," rather than whether the time limit is "substantive" or "procedural," Pet. 19, the decision below would still be correct.[9]

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[9] Petitioner draws this language from *American Pipe*, in which the Court was asked to hold that a statute of *limitations* could be considered "a 'substantive' element" of a claim, and therefore not subject to tolling, because Congress included the statute of limitations in the statute giving rise to the claim. 414 U.S. at 556. The Court also cited the legislative history of the statute of limitations at issue, which reflected

As this Court recognized in *CTS*, the "distinct purpose" of a statute of repose is to "effect a legislative judgment that a defendant should be free from liability after the legislatively determined period of time." 134 S. Ct. at 2183. A repose period accomplishes this objective by imposing a time limit "measured from the date of the last culpable act or omission of the defendant," which "embodies the idea that at some point a defendant should be able to put past events behind him." *Id.* at 2182–83. A statute of repose "is therefore equivalent to a cutoff, in essence an absolute bar on a defendant's temporal liability," which "will not be tolled for any reason." *Id.* at 2183.

As such, applying *American Pipe* tolling to a statute of repose is inconsistent with the legislative purposes behind such a statute for the same reasons that applying equitable tolling to a statute of repose is not permitted: doing so would undermine the certainty and finality that a statute of repose is intended to provide a defendant. *See, e.g., P. Stolz Family P'ship L.P. v. Daum*, 355 F.3d 92, 104 & n.7 (2d Cir. 2004) (noting that the purpose of a statute of repose is "to achieve . . . certainty and finality" by "provid[ing] an easily ascertainable and certain date for the quieting of litigation"). In fact, the only state supreme court to directly consider the question presented here held that a statute of repose was not subject to *American Pipe* tolling for this very reason. *See*

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that the provision was not intended to affect substantive rights. *Id.* at 558 n.29. The Court did not indicate, however, that the same test should apply to a provision that did confer substantive rights, like a statute of repose.

Albano v. Shea Homes Ltd. P'ship, 254 P.3d 360, 366 (Ariz. 2011) (stating that applying *American Pipe* tolling to a state statute of repose "simply is not consonant with the legislative scheme").

Petitioner's outsized recoveries from the other defendants in this action demonstrate why applying *American Pipe* tolling to a statute of repose would be inconsistent with the purposes of such a statute. Under Section 13, defendants are entitled to the certainty and finality of knowing that no additional actions can be filed after the expiration of the repose period. This permits defendants to assess their exposure in all timely filed actions and settle those actions accordingly. Petitioner is thus wrong when it argues that "[w]hether that liability is resolved through a certified class action or through individual suits by class members is irrelevant as far as the policies underlying the statute of repose are concerned." Pet. 21. To the contrary, permitting sophisticated institutional investors like Petitioner to opt out of class settlements after the statute of repose has expired exposes defendants to the very type of additional, unpredictable liability that the repose period was intended to eliminate.[10]

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[10] Nor is such a rule unfair to the well-counseled institutional investors who pursue opt-out litigation—such investors merely need to file an action within the repose period to preserve their claims, as Petitioner did here with respect to other securities it purchased. *See supra* at 5.

B. Enforcing The Statute Of Repose As Written Does Not Raise Any Constitutional Questions

The Second Circuit likewise correctly rejected Petitioner's argument, also raised here, Pet. 24–25, that refusing to apply *American Pipe* tolling to Section 13's statute of repose would violate its due-process rights to opt out of the class.

This argument rests on a fundamental misunderstanding of the nature of an absent class member's opt-out rights. Under this Court's precedent, due process only requires that absent class members not be bound by an action that they were unaware of and did not participate in. In other words, "[t]he due process protections of Rule 23 are directed at preventing a putative class member from being bound by a judgment without her consent." Pet.App.5a (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175–76 (1974)). Thus, the Court in *Phillips Petroleum Co. v. Shutts* held that, in order for a class action to "bind an absent plaintiff," "it must provide minimal procedural due process protection," including that: (1) "[t]he plaintiff must receive notice plus an opportunity to be heard and participate in the litigation"; and (2) "an absent plaintiff [must] be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." 472 U.S. 797, 811–12 (1985).

However, the Court has never held that absent class members have a *further* due-process right to individually pursue the same claims asserted in the

class action, regardless of any additional defenses that may be available in a separate action, as Petitioner argues here.[11] To the contrary, *American Pipe* and its progeny would be entirely unnecessary if due process itself guaranteed absent class members the ability to individually pursue all claims asserted in a class action regardless of their timeliness.

III. PETITIONER'S SECOND QUESTION DOES NOT MERIT THIS COURT'S REVIEW

In addition to seeking the Court's review of the issue it dismissed in *IndyMac*, Petitioner also presents a second question that asks the Court to hold that "no tolling was required" in this case since "petitioner's claims were timely asserted because they were initially presented within the limitations period by the Class Action complaint and then maintained continuously thereafter, first by the class representative on petitioner's behalf and later by petitioner itself in its own lawsuit." Pet. 26. Petitioner argues that such a holding would "resolve . . . proper application of Section 13 in a substantial portion of cases" (although, notably, it would not have resolved the issue in *IndyMac*), and could also resolve a purportedly

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[11] *Ortiz v. Fibreboard Corp.*, which Petitioner cites for the proposition that opt-out rights are based on the principle that "everyone should have his own day in court," Pet. 25, did not hold otherwise. Instead, *Ortiz* primarily addressed the validity of mandatory class actions, where absent class members have no right to opt out, and, with respect to non-mandatory class actions, reaffirmed *Shutts*'s holding that due process only requires notice and an opportunity to opt out "before an absent class member's right of action was extinguishable." 527 U.S. 815, 846–48 (1999).

"related" circuit split concerning whether *American Pipe* tolling applies to individual actions filed before class certification is decided. *Id.*

This question—which asks the Court to adopt a novel holding that has not been accepted by any circuit court and that is inconsistent with the plain text of Section 13, in order to resolve an ancillary and shallow circuit split that was not raised below—does not merit the Court's review.

A. The Holding Petitioner Asks The Court To Adopt Is Both Novel And Inconsistent With The Text Of Section 13

By its very terms, *American Pipe* established a "tolling rule." 414 U.S. at 555. In fact, the Court used the words "toll," "tolls," "tolling," or "tolled" no less than 19 times in *American Pipe*. It has likewise characterized *American Pipe* as establishing a tolling rule in a litany of subsequent cases. *See, e.g.*, *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 755 (2016) (referring to *American Pipe* as "class-action tolling"); *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1634 (2015) (stating *American Pipe* construed a statute of limitations "to be subject to tolling").[12] Petitioner nonetheless asks the Court to sweep aside this well-established understanding of *American Pipe*, and to instead reconceive of *American Pipe* as "a pragmatic understanding of what it means to

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[12] *See also Chardon v. Fumero Soto*, 462 U.S. 650 (1983) (using a form of the word "toll" 41 times in discussing *American Pipe*); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983) (referring to *American Pipe* as establishing a "tolling rule" five times).

commence a suit for purposes of satisfying a limitations period in the special context of a class action," Pet. 27, except (of course) in other circumstances where "[t]olling may be required." *Id.* at 28 n.8. The Court should decline Petitioner's invitation to adopt such a novel rule, which, in any event, is inconsistent with the text of Section 13's statute of repose.

Notably, Petitioner does not identify any prior circuit court decisions that stand for the curious proposition that *American Pipe* tolling is not tolling (except when it is tolling), let alone identify any disagreement among the circuit courts on this issue. In fact, each of the circuit cases from which Petitioner presents quotations to support this argument explicitly recognized that *American Pipe* established a tolling rule. *See State Farm Mut. Auto. Ins. Co. v. Boellstorff*, 540 F.3d 1223, 1228, 1233 (10th Cir. 2008) (stating a class action "in essence pre-file[s]" an absent class member's claim, but "hold[ing] that Colorado would apply the *American Pipe* doctrine to toll the statute of limitations"); *Joseph*, 223 F.3d at 1168 (stating that, "in a sense," *American Pipe* "does not involve 'tolling' at all," but nonetheless "conclud[ing] that *American Pipe* tolling applies" and discussing "the correct date to toll" the limitations period). [13]

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[13] Another circuit court decision relied upon by Petitioner directly rejected this argument. *See Bright v. United States*, 603 F.3d 1273, 1283 (Fed. Cir. 2010) (cited in Pet. 14–15) (rejecting argument that "the filing of the original [class] complaint satisfied the limitations requirement . . . for all putative members of the class" because *American Pipe* "made clear . . . that the means by which the action 'satisfied' the limitation provision's purpose was by 'tolling' the running of the statute").

Petitioner presents no compelling reason for this Court to be the first to adopt this rule.

Moreover, Petitioner's proposed rule is particularly ill-suited to this case, where the applicable statute of repose states that no "action" can be filed after three years. 15 U.S.C. § 77m. It is therefore irrelevant whether "petitioner's *claims* were timely asserted" in the class action—as Petitioner contends, Pet. 26 (emphasis added)—because Section 13 required this "action" and not Petitioner's "claims" to be filed within the repose period.[14] Plainly, the Court should decline to review a question that would not resolve the issue presented under the applicable statute.

B. The Ancillary And Shallow Circuit Split Identified By Petitioner Does Not Warrant Review

Petitioner's argument that the Court should also review the second question presented because adopting a holding that *American Pipe* did not establish a tolling rule (except when it did) could resolve an ancillary circuit split—concerning whether *American Pipe* tolling applies to individual actions filed before a decision on class certification, Pet. 29–34—likewise fails.

Petitioner attempts to manufacture the appearance of a "multifaceted" circuit split on the issue of pre-class-certification tolling by referencing the separate issue of whether statutes of repose can

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[14] As Rule 3 makes clear, "[a] civil action is commenced by filing a complaint with the court," Fed. R. Civ. P. 3, not by presenting claims in a prior action.

be tolled. Pet. 26, 29–34. However, setting aside the unrelated statute-of-repose-tolling issue, each of the Second, Ninth, and Tenth Circuits agrees that *American Pipe* tolling can apply regardless of whether an individual action is filed before class certification. *See State Farm*, 40 F.3d at 1228–30; *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1008–09 (9th Cir. 2007); *In re WorldCom Sec. Litig.*, 496 F.3d 245, 256 (2d Cir. 2007). The only conflicting circuit court identified by Petitioner is the Sixth Circuit, which has held that *American Pipe* tolling only applies to individual actions filed after a decision on class certification. *See Wyser-Pratte Mgmt. Co. v. Telxon Corp.*, 413 F.3d 553, 569 (6th Cir. 2005).[15] However, a more recent Sixth Circuit panel has recognized that "*Wyser-Pratte* now represents the minority rule" and expressed "doubts about its holding," *Stein*, 821 F.3d at 789, raising the possibility that the Sixth Circuit may reconsider its decision and resolve the existing, shallow circuit split.

It would thus be premature for the Court to grant review to resolve this ancillary issue, which the circuit courts are continuing to consider.[16]

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[15] The 30-year-old First Circuit case cited by Petitioner, Pet. 31–32, did not so hold. While the court in that case stated in *dicta* that permitting an absent class member to maintain a separate action before class certification would not serve the policies behind Rule 23 and *American Pipe*, that issue was not before the First Circuit. *See Glater v. Eli Lilly & Co.*, 712 F.2d 735, 739–40 & n.3 (1st Cir. 1983).

[16] Notably, the Court has also previously declined to review this issue. *See* Pet. for Cert., *E.I. DuPont de Nemours & Co. v. Stanton*, No. 08-210 (filed Aug. 15, 2008) (presenting the question of whether "a putative class member who files an

C. The Issue Of Whether *American Pipe* Tolling Applies To Actions Filed Before Class Certification Was Not Raised Below

Even if the ancillary, pre-class-certification-tolling issue did present a significant circuit split, this appeal would be an inappropriate vehicle to consider the issue because it was not raised below. Moreover, even if it had been raised, Petitioner would have prevailed, and therefore would not be an appropriate party to raise the issue here.

In this case, Respondents moved to dismiss Petitioner's claims as time-barred under Section 13's statute of repose; they did not argue that Petitioner was not entitled to tolling because it filed this action before class certification. *See* Dkt. Nos. 558, 1265 in No. 09-md-02017-LAK-GWG (S.D.N.Y.). In opposing that motion, Petitioner also did not raise that issue. *See* Dkt. No. 705 in No. 09-md-02017-LAK-GWG (S.D.N.Y. Feb. 13, 2012). Nor did Petitioner raise the issue on appeal. *See* Dkt. No. 40 in 15-1879 (2d Cir. Sept. 17, 2015). Moreover, neither the District Court nor the Second Circuit ruled on the issue. Pet.App.B; Pet.App.A.

The pre-class-certification-tolling issue is therefore inappropriate to review here because, "[i]n the ordinary course," this Court "do[es] not decide questions neither raised nor resolved below," *Glover v. United States*, 531 U.S. 198, 205 (2001),

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individual lawsuit while a motion for class certification is pending is nonetheless entitled to class action tolling"), *cert. denied* 555 U.S. 1084 (2008). Petitioner does not identify any changed circumstances that merit the Court accepting the issue now.

decide issues on which the lower courts' decisions did not turn, *Smith v. Butler*, 366 U.S. 161 (1961) (per curiam), or entertain questions "that the record does not adequately present," *McClanahan v. Morauer & Hartzell, Inc.*, 404 U.S. 16 (1971) (per curiam). Moreover, it is doubly inappropriate for Petitioner to seek review of this question here because it would have prevailed on the issue before the Second Circuit. *See WorldCom*, 496 F.3d at 256. Petitioner therefore is not the appropriate party to ask the Court to review that issue. *See California v. Rooney*, 483 U.S. 307, 310–11 (1987) (per curiam) (stating it is not "appropriate . . . for the prevailing party to request" review).

IV. THE PRESENCE OF MULTIPLE QUESTIONS IN THE PETITION MAKES THIS AN INAPPROPRIATE VEHICLE TO RESOLVE THOSE ISSUES

Finally, the presence of multiple, independent questions in the petition makes this case an inappropriate vehicle to resolve any of the issues presented. For example, if the Court were to adopt the novel rule that Petitioner's action was commenced by the filing of the class action and tolling was not necessary, the Court would not need to reach the issue of whether *American Pipe* tolling applies to statutes of repose. Similarly, if the Court were to hold that Petitioner was not entitled to *American Pipe* tolling because it filed suit before class certification, the decision below would be affirmed without needing to reach the issue of whether *American Pipe* tolling applies to statutes of repose. If the Court is inclined to review either issue, it should therefore wait for an appeal that more cleanly raises that issue.

CONCLUSION

The petition should be denied.

Respectfully submitted,

Victor L. Hou
Counsel of Record
(admission pending)
Mitchell A. Lowenthal
Jared Gerber
Abena Mainoo
Anthony M. Shults
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
(212) 225-2000
vhou@cgsh.com

Counsel for Respondents ANZ Securities, Inc., Bankia, S.A., BBVA Securities Inc., BMO Capital Markets Corp., BNP Paribas FS, LLC, BNP Paribas, BNY Mellon Capital Markets, LLC, CIBC World Markets Corp., Citigroup Global Markets Inc., Daiwa Capital Markets Europe Limited, DZ Financial Markets LLC, HSBC Securities (USA) Inc., ING Financial Markets LLC, Mizuho Securities USA Inc., Muriel Siebert & Co., Inc., nabSecurities, LLC, Natixis Bleichroeder Inc., RBC Capital Markets, LLC, RBS Securities Inc., RBS WCS Holding Company, Santander Investment Securities, Inc., Scotia Capital (USA) Inc., SG Americas Securities, LLC, Sovereign Securities Corporation, LLC, SunTrust Capital Markets Inc., Utendahl Capital Partners, L.P., Wachovia Securities, LLC, and Wells Fargo Securities, LLC

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IN THE

Supreme Court of the United States

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM,
Petitioner,

v.

ANZ SECURITIES, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

REPLY BRIEF

Darren J. Robbins
Joseph D. Daley
ROBBINS GELLER
RUDMAN & DOWD LLP
655 West Broadway
Suite 1900
San Diego, CA 92101

Thomas C. Goldstein
Counsel of Record
Kevin K. Russell
Tejinder Singh
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda MD, 20814
(202) 362-0636
tg@goldsteinrussell.com

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF 1

I. This Court Should Grant Certiorari To Address Whether *American Pipe* Applies To So-Called Statutes Of Repose. 2

II. This Court Should Grant Certiorari To Address Whether Limitations Periods Apply To Plaintiffs Who File Their Individual Opt Out Complaints While Class Actions Are Pending. 8

III. This Case Is An Ideal Vehicle. 11

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Am. Pipe & Constr. Co. v. Utah,
414 U.S. 538 (1974) 1, 3, 5, 9

Appleton Elec. Co. v. Graves Truck Line, Inc.,
635 F.2d 603 (7th Cir. 1980) 4

Bright v. United States, 603 F.3d 1273 (Fed. Cir. 2010) 4, 5

Credit Suisse Sec. (USA) LLC v. Simmonds,
132 S. Ct. 1414 (2012) 3

Crown, Cork & Seal Co., Inc. v. Parker,
462 U.S. 345 (1983) 8

CTS Corp. v. Waldburger,
134 S. Ct. 2175 (2014) 3, 5

Davis v. Passman,
442 U.S. 228 (1979) 10

Jones v. Bock,
549 U.S. 199 (2007) 10

Joseph v. Wiles,
223 F.3d 1155 (10th Cir. 2000) 3

Smith v. Bayer Corp.,
564 U.S. 299 (2011) 3

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011) 8

Statutes

15 U.S.C. § 77k 10

REPLY BRIEF

The petition presents two important and related questions about the application of the rule of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), in securities class action cases, both of which directly implicate square circuit conflicts.

This Court granted certiorari on the first Question Presented only two years ago in *IndyMac*, and the need for review has not abated because the issue continues to arise, producing inconsistent rulings across the nation. Indeed, the court below confirmed that the question is "ripe for resolution by the Supreme Court," noting that because this "issue implicates the very nature of *American Pipe* tolling," the "Supreme Court is in the best position to resolve" it. Pet. App. 5a-6a. The court of appeals further declared that "unless and until the Supreme Court informs us that our decision was erroneous, *IndyMac* continues to be the law of the Circuit and its reasoning controls the outcome of this case." *Id.* 6a.

The second Question Presented is likewise certworthy because it, too, speaks to the nature of *American Pipe* tolling. Petitioner CalPERS directly argued that its individual complaint was timely because it filed its complaint—asserting the same causes of action as the class action complaint—prior to the dismissal of the class action, rendering tolling unnecessary. The court of appeals' sole response was to say that this "argument was presented to the *IndyMac* panel, which declined to adopt it." Pet. App. 5a. Respondents do not dispute that this argument implicates a circuit conflict over the proper application of *American Pipe* to cases in which the individual opt-out plaintiff files its complaint prior to the class

certification decision, and therefore provides an opportunity to resolve that conflict as well.

This case presents an excellent vehicle to resolve both Questions Presented because it directly implicates not only *American Pipe* tolling but also the constitutionally protected right of class action plaintiffs to opt out of class proceedings. It is undisputed that CalPERS was a member of a properly constituted class, and that it opted out of the class settlement in order to pursue the same causes of action presented by the class action. Indeed, CalPERS was exceptionally diligent in pursuing its claims because it filed its individual complaint before judgment was entered in the class action—thus ensuring that it had a live claim against respondents at all times.

Against those considerations, respondents' quibble over the depth and durability of the splits, as well as their merits arguments, fall flat. Respondents' argument that this case is an improper vehicle because it presents two questions is also wrong. The opportunity to resolve two circuit splits is a virtue, not a drawback, of the petition. But if the Court disagrees, then it can avoid any potential complications by limiting the grant of certiorari to the first Question Presented.

I. This Court Should Grant Certiorari To Address Whether *American Pipe* Applies To So-Called Statutes Of Repose.

The first Question Presented is the same question that the Court granted certiorari to resolve in *IndyMac*—and is therefore indisputably certworthy.

1. Respondents argue that the circuit split is shallow and speculate that it may resolve itself if the Tenth Circuit revisits its decision in *Joseph v. Wiles*, 223 F.3d 1155 (10th Cir. 2000). These arguments are persuasively addressed in the reply brief filed by the petitioner in *DeKalb County Pension Fund v. Transocean Ltd.*, No. 16-206, which explains that the Tenth Circuit has reaffirmed *Joseph* both before and after this Court's decision in *CTS Corp. v. Waldburger*, 134 S. Ct. 2175 (2014), thus signaling that it will not revisit its settled precedent. *DeKalb* Reply 3-4.[1]

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[1] Respondents also argue that the Tenth Circuit's decision has been undermined by this Court's decision in *Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011), which stated that absent class members are not parties to class action lawsuits before the class is certified. BIO 15. But whether unnamed class members are properly deemed "parties" for the purposes of preclusion doctrine has no bearing on whether they may rely on the class action lawsuit to preserve their rights, and thus avail themselves of *American Pipe* tolling. As the Court stated in *American Pipe* itself, when a valid class action commences, "the claimed members of the class stood as parties to the suit until and unless they received notice thereof and chose not to continue." 414 U.S. at 551. Indeed, respondents' reading of *Smith* would produce absurd results: taken at face value, respondents' argument would prevent district courts from certifying a class after the repose period has run—but nobody thinks that is correct. Respondents further argue that this Court denied any distinction between legal and equitable tolling in *Credit Suisse Securities (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1419 n.6 (2012), but that case in fact refused to collapse the lower courts' distinction between legal and equitable tolling. In any event, both *Smith* and *Credit Suisse* were decided before the Court granted certiorari in *IndyMac*, demonstrating that the issue continues to merit this Court's review.

Contrary to respondents' suggestion (BIO 16-18), the split also is not shallow. The decision below is inconsistent with decisions from the Seventh and Federal Circuits, which have held that *American Pipe* tolling is available even vis-à-vis jurisdictional statutes of limitations that are not subject to equitable tolling. Respondents argue that statutes of repose are different because they serve different purposes and create substantive rights. BIO 17-18. But the Seventh Circuit explained in *Appleton Electric Co. v. Graves Truck Line, Inc.*, 635 F.2d 603, 608 (7th Cir. 1980), that in its view the running of a jurisdictional statute of limitations "not only bars the remedy but also destroys the liability." The court of appeals nevertheless held that *American Pipe* tolling applies because "effectuation of the purposes of litigative efficiency and economy . . . transcends the policies of repose and certainty behind statutes of limitations." *Id.* at 609.

Similarly, in *Bright v. United States*, 603 F.3d 1273, 1287-88 (Fed. Cir. 2010), the court recognized that jurisdictional statutes are not subject to equitable tolling, but it concluded that "class action statutory tolling" under *American Pipe* rests on a different footing—not because there is something inherently flexible about a jurisdictional statute of limitations, but instead because *American Pipe* tolling "does not modify a statutory time limit" at all, since the class complaint, which brings the action for all class members, must be timely filed for *American Pipe* to apply. For the same reasons, the *Bright* court also rejected an argument that is plainly analogous to respondents' Rules Enabling Act contention: the argument that federal courts cannot use their procedural rules to enlarge their jurisdiction. *See*

id. at 1286. That reasoning—like the reasoning of the Seventh Circuit—simply cannot be reconciled with the *IndyMac* rule adopted below.

In any event, respondents' attempts to distinguish the Seventh and Federal Circuits' decisions rest on the assumption that their merits arguments are correct, *i.e.*, that statutes of repose create a substantive right to prohibit individual plaintiffs from pursuing their claims after a timely class complaint has been filed, such that the Rules Enabling Act forecloses tolling for the individual complaints. But that point clearly is not conceded, and respondents cite no cases from the Seventh or Federal Circuits accepting that proposition. The principal authority on which respondents rely, *Waldburger*, also never describes statutes of repose that way, and never suggests that the Rules Enabling Act would prohibit *American Pipe* tolling (or any other legal tolling) of repose periods; indeed, it never discusses the Rules Enabling Act at all.[2]

Thus, on the key questions—whether *American Pipe* tolling is legal or equitable, and whether the Rules Enabling Act prohibits tolling of the entire limitations periods in the Securities Act—the courts remain unambiguously and intractably divided, and certiorari should be granted to resolve the conflict.

Respondents also note that the Third and Ninth Circuits are in the process of adjudicating cases involving the Question Presented. BIO 18-19. But that

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[2] Moreover, as explained in the petition (at 18-19), *American Pipe* itself rejected a Rules Enabling Act challenge to its holding. *See* 414 U.S. at 557-59.

only proves that the issue continues to roil the lower courts, consuming judicial resources and disrupting the orderly administration of the securities laws. However those courts rule, the circuits and district courts will still be divided—and litigants in the other circuits that have not addressed the question will still face uncertainty over what to do. Respondents do not argue that either the Third or the Ninth Circuit cases would present a superior vehicle to address the question, so there is no reason to wait for them.

2. Respondents also preview—at length—their merits argument, arguing the *American Pipe* tolling is equitable, that statutes of repose cannot be tolled, and that class members may not feel compelled to opt out to pursue individual claims. BIO 19-29. These concerns are all persuasively addressed in the *DeKalb* Reply (at 6-7, 9-11) and in the petitioner's merits briefs in *IndyMac*, and there is no need to address them again here. In any event, respondents' merits arguments do not relate to the Court's certiorari criteria, and therefore do not weigh against review.[3]

Respondents do raise one point that is specific to this case. They argue that because petitioner obtained favorable judgments against other defendants when its

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[3] Along the way, respondents concede—as they must—that a large number of opt-outs are more likely in large class action cases (like the *Petrobras* case, which resulted in hundreds of opt-outs). BIO 21 n.5. That, of course, is true: opting out is expensive, and only worthwhile in cases involving a substantial potential recovery. Even if the opt-out issue only arises in cases involving a lot of money, it would still be very important—because those cases are important—and would still warrant this Court's review.

opt-out claims were permitted to proceed, similar claims against respondents would expand their liability in violation of their substantive rights. BIO 27. The premise of respondents' argument is that because they may have been required—as a result of differences in litigation strategy and leverage—to pay more money to settle with CalPERS, they were exposed to additional liability in violation of the statute of repose. But statutes of repose are not absolute caps on the value of claims. Imagine the following hypothetical: prior to the expiration of the repose period, the class retained lawyers who were willing to settle with the defendants for a pittance, but after the statute of repose lapsed the plaintiffs fired those lawyers and found new counsel who were determined to get full value for the class claims. If the settlement value increased, the settlement value would not offend the statute of repose. Similarly, if discovery after the repose period revealed that the harm caused by a defendant's fraud was far greater than anticipated, the statute of repose would not prohibit defendants from paying more than they had planned to pay before the repose period expired.

The same is true here. Respondents do not dispute that the class complaint was timely, and that it asserted the very same causes of action against respondents that CalPERS pursued individually. By opting out of the class, CalPERS merely took control over its causes of action from the class representatives—and in the process gave both the class and respondents timely notice of its intent to do so. Thus, respondents have not been exposed to any additional claims or theories of liability, and they have no grounds to plead surprise.

The only difference is that CalPERS is now pursuing its causes of action with its own counsel.

Respondents' argument inadvertently highlights why their rule threatens the constitutional right to opt out of class actions, which exists for precisely this reason, *i.e.*, to allow class plaintiffs who are unsatisfied with the representative action to vindicate their own interests. Respondents argue (BIO 28-29) that while plaintiffs have a due process right not to be bound by a judgment without their consent, they have no separate right to pursue their own claims. That is contrary to every one of this Court's opt-out cases, including *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011), which explained that denial of the right to opt out is constitutionally significant because it strips the plaintiff of his "right to sue." That right would be a nullity if opting out necessarily resulted in the forfeiture of the individual claim on timeliness grounds—which is exactly what would happen without *American Pipe*. *See Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 351-52 (1983). In any event, the scope of the due process opt-out right, and its effect on the availability of *American Pipe* tolling, are exactly what this Court should adjudicate on the merits.

II. This Court Should Grant Certiorari To Address Whether Limitations Periods Apply To Plaintiffs Who File Their Individual Opt Out Complaints While Class Actions Are Pending.

This case also presents a second question, which is whether CalPERS' claims are timely because it took over its causes of action before judgment was entered

on the class complaint, so that CalPERS always had a live claim, and tolling—as that term ordinarily is used—was unnecessary.

1. Respondents argue that *American Pipe* only creates a tolling rule, and that no circuit court has reached a contrary decision. BIO 30. The *American Pipe* opinion, however, was divided into multiple sections. Section I does not discuss tolling at all, but instead sets forth a general explanation of how class actions work under Rule 23. 414 U.S. at 545-52. In that section, the Court explains that "[u]nder present Rule 23 . . . the filing of a timely class action complaint commences the action for all members of the class as subsequently determined," so that "the commencement of the action satisfie[s] the purpose of the limitation provision as to all those who might subsequently participate in the suit as well as for the named plaintiffs." *Id.* at 550-51. That is not a tolling principle, but instead an explanation that the unnamed class members' claims *have been timely brought* if they are members of a putative class asserted in a valid class action complaint. The Tenth Circuit has endorsed this interpretation of *American Pipe*, and respondents themselves cite the relevant cases. BIO 31; *see also* Pet. 30-31 (describing the cases in detail).

Respondents argue that Section 13 precludes CalPERS' contention because Section 13 prohibits the filing of an "action" after three years. BIO 32. But the better reading of the statute is that the word "action" means a "cause of action," and not a "civil action." Section 13, after all, modifies Section 11, which confers a "cause of action" on security purchasers. 15 U.S.C.

§ 77k. That language refers to a claim under Section 11—not to an entire lawsuit. *See Davis v. Passman*, 442 U.S. 228, 240 (1979) (explaining that a statutory "cause of action" is an "element of [a] 'claim'" for relief under that statute). *Cf. Jones v. Bock*, 549 U.S. 199, 220 (2007) (holding, in a case in which an exhaustion requirement provided that "no action shall be brought" absent exhaustion, that courts should read this "boilerplate" language to refer to individual claims, and not entire cases).

In this case, CalPERS' causes of action were brought—on its behalf—in the timely class complaint. CalPERS took over control of them before they were dismissed. Therefore, the timely causes of action merely continued their journey under new stewardship, and tolling arguably was not required.

2. Respondents acknowledge that this question implicates a separate circuit split over whether a plaintiff who files an individual complaint before the district court adjudicates class certification, but attempt to downplay it as "ancillary" and "shallow." BIO 32. The petition illustrates that the split has endured for decades—but CalPERS agrees that it is "ancillary" in the sense that the Court can resolve this case without speaking directly to that question (especially since respondents have not attempted to argue that CalPERS' claim should fail because it filed its own complaint too early). However, when this Court adjudicates CalPERS' argument that its claims are timely because they were brought before the dismissal of the class action, it will necessarily resolve issues underlying the split, and most likely resolve it.

III. This Case Is An Ideal Vehicle.

Respondents do not dispute that but for the statute of repose, CalPERS' claims would be timely under *American Pipe*. Thus, they do not dispute that CalPERS was a member of a valid class action, that its individual causes of action mirror the class causes of action, and that it properly opted out of the class to pursue those causes of action.

Instead, they raise only one vehicle objection, which is that because the petition presents two questions, the Court should not consider either. BIO 35. That cannot be right. The presence of two questions is a feature, not a bug: it will allow the Court to consider the nature and scope of *American Pipe* more comprehensively, and to issue a decision that accounts for more of the fact patterns that regularly arise in securities cases.

If the Court perceives any potential complications arising from the fact that this case presents two questions, it has a number of options to address that potential. The Court could limit the grant of certiorari only to the first question—which would work because this case squarely presents that question on compelling facts. Or, it could grant certiorari in this case and another of the pending petitions in order to encourage a more complete presentation on each of the two questions. Either way, the Court should hear this case, which is the only one that implicates the distinct circuit conflict over the application of limitations periods when the individual plaintiff files a complaint prior to class certification.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Darren J. Robbins
Joseph D. Daley
ROBBINS GELLER
RUDMAN & DOWD LLP
655 West Broadway
Suite 1900
San Diego, CA 92101

Thomas C. Goldstein
Counsel of Record
Kevin K. Russell
Tejinder Singh
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda MD, 20814
(202) 362-0636
tg@goldsteinrussell.com

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RETIRED FEDERAL JUDGES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

ANDREW N. GOLDFARB
Counsel of Record
GRAEME W. BUSH
JOHN J. CONNOLLY
ZUCKERMAN SPAEDER LLP
1800 M Street, NW, Ste. 1000
Washington, DC 20036
(202) 778-1800
agoldfarb@zuckerman.com

Counsel for Amici

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. Federal Securities Class Actions Present Difficult Case Management Problems 3

II. The *IndyMac* Rule Followed Below Is Likely To Increase Protective Filings 7

III. Applying the Rule of *American Pipe* Would Minimize Case Management Issues and Promote a Fair Resolution of Securities Class Actions 14

CONCLUSION 20

APPENDIX: List of *Amici* 1a

TABLE OF AUTHORITIES

Page

CASES

American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974) ..... passim

Aronson v. McKesson HBOC, Inc., 79 F. Supp. 2d 1146 (N.D. Cal. 1999) 12

Burke v. Ruttenberg, 102 F. Supp. 2d 1280 (N.D. Ala. 2000) 15

Chill v. Green Tree Fin. Corp., 181 F.R.D. 398 (D. Minn. 1998) 12

City of Detroit v. Goldman, Sachs & Co., No. 10 Civ. 4429 (MGC), 2014 WL 1257782 (S.D.N.Y. Mar. 27, 2014) 8

Crown, Cork & Seal Co. v. *Parker*, 462 U.S. 345 (1983) 7

DeJulius v. New England Health Care Empl. Pension Fund, 429 F.3d 935 (10th Cir. 2005) 16

Devlin v. Scardelletti, 536 U.S. 1 (2002) 8

Haines v. Kerner, 404 U.S. 519 (1972) 17

In re Baan Co. Sec. Litig., 186 F.R.D. 214 (D.D.C. 1999) 5, 12

In re Cendant Corp. Sec. Litig., 109 F. Supp. 2d 273 (D.N.J. 2000) 15

In re Cendant Corp. Sec. Litig., 404 F.3d 173 (3d Cir. 2005) 5, 13

In re Citigroup Inc. Bond Litig., 296 F.R.D. 147 (S.D.N.Y 2013) 1

In re Community Bank of N. Va., 418 F.3d 277 (3d Cir. 2005) 17

In re Enron Corp. Sec. Litig., 206 F.R.D. 427 (S.D. Tex. 2002) 5, 15

In re First Union Corp. Sec. Litig., 157 F. Supp. 2d 638 (W.D.N.C. 2000) 15

In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (3d Cir. 1995) 13

In re Initial Public Offering Sec. Litig., 499 F. Supp. 2d 415 (S.D.N.Y. 2007) 17

In re Milken & Assocs. Sec. Litig., 150 F.R.D. 46 (S.D.N.Y. 1993) 1

In re Network Assocs., Inc. Sec. Litig., 76 F. Supp. 2d 1017 (N.D. Cal. 1999) 5, 12

In re Oxford Health Plans, Inc., Sec. Litig., 182 F.R.D. 42 (S.D.N.Y. 1998) 5

In re Telxon Corp. Sec. Litig., 67 F. Supp. 2d 803 (N.D. Ohio 1999) 14, 15

Jenkins v. *Missouri*, 78 F.3d 1270 (8th Cir. 1996) 17

Joseph v. Wiles, 223 F.3d 1155 (10th Cir. 2000).....8

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991).....8

Odle v. *Wal-Mart Stores, Inc.*, 747 F.3d 315 (5th Cir. 2014).....8

Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc., 721 F.3d 95 (2d Cir. 2013), *cert. granted sub nom., Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, 134 S. Ct. 1515 (2014), *cert. dismissed as improvidently granted*, 135 S. Ct. 42 (2014) ..... passim

Sakhrani v. Brightpoint, Inc., 78 F. Supp. 2d 845 (S.D. Ind. 1999) 4, 5

Simmons v. Spencer, No. 13 Civ. 8216 (RWS), 2014 WL 1678987 (S.D.N.Y. Apr. 25, 2014).....5

Stein v. Regions Morgan Keegan Sel. High Inc. Fd., 821 F.3d 780 (6th Cir. 2016) 11

Takeda v. Turbodyne Techs., Inc., 67 F. Supp. 2d 1129 (C.D. Cal. 1999) 12

Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308 (2007).....6

Wyser-Pratte Mgmt. Co. v. Telxon Corp., 413 F.3d 553 (6th Cir. 2005) 11

STATUTES

15 U.S.C. § 78u-4(a)(3)(A)(i) 3

15 U.S.C. § 78u-4(a)(3)(B).....3

15 U.S.C. § 78u-4(a)(3)(B)(ii) 5

15 U.S.C. § 78u-4(b)(1)-(2) 16

15 U.S.C. § 78u-4(b)(2)(A) 6

H.R. Rep. No. 104-369 (1995) 4

Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 ..... passim

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3 WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS (5th ed. 2013) 9, 18, 19

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7B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE (3d ed. 2005) 16

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BARBARA ROTHSTEIN & THOMAS E. WILLGING, MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES (3d ed. 2010) 7

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Elliott J. Weiss, *The Lead Plaintiff Provisions of the PSLRA After a Decade, or "Look What's Happened to My Baby,"* 61 VAND. L. REV. 543 (2008) 4

J. Rosenbloom, *Exploring Methods to Improve Management and Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York*, 30 FORDHAM URB. L.J. 305 (2002) 17

Lawsuit News, Business Wire, http://www.Business wire.com/portal/site/home/news/subject/?vnsId =31361 (last visited May 27, 2014) 4

Restatement (Second) of Trusts § 177 (1959) 12

Svetlana Starykh & Stefan Boettrich, *Recent Trends in Securities Class Action Litigation: 2015 Full-Year Review* 19 (2016), *available at* http://www.nera.com/content/dam/nera/public ations/2016/2015_Securities_Trends_Report_ NERA.pdf 6, 10

INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are former federal district court judges who have experience adjudicating class action cases under securities and other laws. The attached Appendix contains a list of the *amici* along with biographical information for each. *Amici* are interested in this case because of their years of service to the federal judiciary and their ongoing commitment to ensure that federal judges have the means to manage their caseloads and dispense equal justice under law to all litigants.

Amici urge the Court to grant the petition for a writ of *certiorari*, to reverse the decision below, and to hold that the rule announced in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), applies to the three-year time limitation in § 13 of the Securities Act of 1933 for asserted class members.[2]

SUMMARY OF ARGUMENT

Securities class actions are among the most complicated and time-consuming actions that come before federal district courts. *See, e.g., In re Citigroup Inc. Bond Litig.*, 296 F.R.D. 147, 155 (S.D.N.Y. 2013); *In re Milken & Assocs. Sec. Litig.*, 150 F.R.D. 46, 53

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[1] All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part and no person or entity other than *amici* or their counsel made a monetary contribution for the preparation or submission of this brief.

[2] *Amici* take no position on the merits of this or other securities class actions.

(S.D.N.Y. 1993). In the judgment of *amici*, the rule of *American Pipe* has had a salutary effect on management of securities class actions, and a substantial erosion of that rule would burden federal judges and federal courts without materially improving justice to the parties. In particular, *amici* envision an increase in "protective filings" if the decision below is affirmed. That is, a holding by this Court that the *American Pipe* rule does not apply to the three-year time limitation in § 13 of the Securities Act could cause unnamed class members in pending and future securities class actions to move to intervene in class cases, or file their own independent actions, simply to preserve their claims. These filings will complicate the already difficult process of choosing a lead plaintiff in a securities class action. They may also create competing factions of plaintiffs who may burden federal courts with duplicative filings and intra-party disputes. Further, a substantial increase in multidistrict litigations could ensue if unnamed class members choose to file independent suits in districts most convenient for them, but which might differ from the district in which the class case is proceeding. A single, consolidated class action could thus become subject to an MDL procedure that would expend more of the judiciary's time and resources than necessary. *Amici* also envision an increase in *pro se* filings by investors, which create special burdens for the court system. Applying *American Pipe* to § 13's three-year period (and similar provisions in the federal securities laws),[3] by contrast, will promote an orderly

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[3] This Court has likened § 13 to certain time-for-suit provisions in the Securities Exchange Act of 1934. *See Lampf,*

procedure through which the court can determine whether the claims are suitable for class-based relief, and manage the case thereafter toward a fair resolution based on the facts and the law.

ARGUMENT

I. FEDERAL SECURITIES CLASS ACTIONS PRESENT DIFFICULT CASE MANAGEMENT PROBLEMS.

Securities class actions present unique challenges that make them among the most difficult cases for federal district courts to manage. *Amici* are concerned about any change in class action procedure that threatens to exacerbate those difficulties.

In the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 737, Congress created a special set of procedures to govern a federal securities class action suit. The earliest stage of the case often is dominated by selection of a "lead plaintiff," a process intended to ensure that the litigation is managed for the class by an investor with a large financial interest in the relief sought by the class. *See* 15 U.S.C. § 78u-4(a)(3)(B). To ensure selection of an appropriate lead plaintiff, the plaintiff who files a securities class-action complaint has 20 days to "cause to be published, in a widely circulated national business-oriented publication or wire service, a notice advising members of the purported plaintiff class" of "the pendency of the action, the claims asserted therein, and the purported class

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Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 359-61 (1991).

period." 15 U.S.C. § 78u-4(a)(3)(A)(i). The notice also provides that any member of the purported class has 60 days to move the court to serve as lead plaintiff. *Id.*

These provisions were intended in part to encourage sophisticated institutional investors to serve as lead plaintiffs. *E.g.*, H.R. Rep. No. 104-369, at 34 (1995) (Conf. Rep.). The notices are not sent solely to institutional investors, of course; they are published in business media and are read by individual investors, financial advisors, and class-action lawyers, who must decide what action to take when they or their clients bought or sold securities in the defendant company during the relevant period.

Scores of these notices are available for review on sites such as Business Wire.[4] They typically provide a summary of the claims and the deadline for filing a motion to serve as lead plaintiff. Many also indicate that class members need not take any action to be a member of the class, and they invite class members to call the named plaintiff's law firm if they have questions. Law firms often form an ad hoc "group of persons" from the investors who contact them, and then move the court to appoint the group as lead plaintiff. *See Sakhrani v. Brightpoint, Inc.*, 78 F. Supp. 2d 845, 850-51 (S.D. Ind. 1999) (volunteers for lead plaintiff "are often collected by inviting investors who read the national notice under the PSLRA to send in a form to a law firm"); Elliott J. Weiss, *The Lead Plaintiff Provisions of the PSLRA After a*

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[4] *See* Lawsuit News, Business Wire, http://www.Businesswire.com/portal/site/home/news/subject/?vnsId=31361 (last visited Oct. 17, 2016).

Decade, or "Look What's Happened to My Baby," 61 VAND. L. REV. 543, 560 (2008).

In many cases multiple plaintiffs using different law firms file similar securities class-actions against the same defendant. *E.g., In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 196 (3d Cir. 2005) (noting that 62 complaints were filed on behalf of the class); *In re Network Assocs., Inc. Sec. Litig.*, 76 F. Supp. 2d 1017, 1019 (N.D. Cal. 1999) (noting that 19 class actions were filed promptly after decline in stock prices). These competing complaints are often the subject of a motion for consolidation, which the district judge must adjudicate before appointing a lead plaintiff. *See* 15 U.S C. § 78u-4(a)(3)(B)(ii).

The appointment of a lead plaintiff is often contested by competing factions of plaintiffs. *E.g., In re Enron Corp. Sec. Litig.*, 206 F.R.D. 427, 439-40 (S.D. Tex. 2002) (considering motions for appointment of lead counsel). District judges, consistent with the intent of the PSLRA, generally try to manage these early skirmishes by limiting the number of lead plaintiffs. *E.g., Sakhrani*, 78 F. Supp. 2d at 854 (naming only one lead plaintiff – the individual investor with the largest losses during the class period); *compare In re Oxford Health Plans, Inc., Sec. Litig.*, 182 F.R.D. 42, 47 (S.D.N.Y. 1998) (concluding interests of the proposed class would be best served by a group of three co-lead plaintiffs). In *In re Baan Co. Securities Litigation*, 186 F.R.D. 214 (D.D.C. 1999), for instance, the district judge observed that "a small committee will generally be far more forceful, effective and efficient than a larger aggregation." Consequently, "[t]he Lead Plaintiff decision should be made under a rule of reason but in

most cases three should be the initial target, with five or six as the upper limit." *Id.* at 217; *e.g.*, *Simmons v. Spencer*, No. 13 Civ. 8216 (RWS), 2014 WL 1678987 (S.D.N.Y. Apr. 25, 2014) (appointing two lead plaintiff applicants, a total of six individuals, to serve as co-lead plaintiffs).

Many additional complexities arise after the lead plaintiff is selected. Motions to dismiss are filed in roughly 96 percent of securities class actions, Svetlana Starykh & Stefan Boettrich, *Recent Trends in Securities Class Action Litigation: 2015 Full-Year Review* 19 (2016), *available at* http://www.nera.com/content/dam/nera/publications/2016/2015_Securities_Trends_Report_NERA.pdf, and the heightened pleading standards under the PSLRA, which apply to fraud-based claims, often result in hotly contested disputes at the pleading stage. Moreover, those motions to dismiss often turn on whether plaintiffs have satisfied the PSLRA's requirement that, with respect to each allegedly fraudulent act or omission, they "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2)(A). Resolving that question often requires that the district judge take a hard look at the plaintiffs' allegations and, where appropriate, materials subject to judicial notice. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322-23 (2007). If the case proceeds after the initial motions are resolved, the district judge must structure and monitor discovery, rule on a motion for certification, adjudicate motions for summary judgment, design and manage a trial (in the comparatively few cases that are tried), review and approve settlement agreements—including conducting fairness hearings—address objections

from class members, and address questions of attorneys' fees. In high-stakes class actions, many of these events are intensely litigated. Others, such as settlement and attorneys' fees, may not be contested at all, and the district judge must perform an independent analysis to ensure compliance with the letter and spirit of Federal Rule of Civil Procedure 23. *See generally* BARBARA ROTHSTEIN & THOMAS E. WILLGING, MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES 1-3 (3d ed. 2010). District judges themselves may have duties to absent class members, particularly at the settlement stage. *See id.* at 12.

II. THE *INDYMAC* RULE FOLLOWED BELOW IS LIKELY TO INCREASE PROTECTIVE FILINGS.

In *American Pipe* and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), this Court concluded that the running of a statute of limitations should be suspended for the claims of absent class members during the pendency of a class action complaint. Each of those decisions was grounded in part on the concern that a contrary rule would induce potential class members "to file protective motions to intervene or to join in the event that a class was later found unsuitable." *American Pipe*, 414 U.S. at 553; *see also Crown, Cork & Seal*, 462 U.S. at 353-54. In essence, the *American Pipe* rule vindicates the case management principles embedded in Rule 23. As the Court observed in *American Pipe*, a "federal class action is no longer 'an invitation to joinder' but a truly representative suit designed to avoid, rather

than encourage, unnecessary filing of repetitious papers and motions." 414 U.S. at 550.

Scores of appellate and district judges have endorsed that reasoning in securities class actions. *E.g.*, *Odle* v. *Wal-Mart Stores, Inc.*, 747 F.3d 315, 323 n.45 (5th Cir. 2014); *Joseph v. Wiles*, 223 F.3d 1155, 1167 (10th Cir. 2000); *Police & Fire Ret. Sys. of City of Detroit v. Goldman, Sachs & Co.*, No. 10 Civ. 4429 (MGC), 2014 WL 1257782, at *8 (S.D.N.Y. Mar. 27, 2014). Indeed, this Court has consistently adhered to that reasoning, including in at least one case decided after *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991). In *Devlin v. Scardelletti*, 536 U.S. 1 (2002), the Court noted that nonnamed class members are "parties in the sense that the filing of an action on behalf of the class tolls a statute of limitations against them." *Id.* at 10. "Otherwise," the Court added, "all class members would be forced to intervene to preserve their claims, and one of the major goals of class action litigation – to simplify litigation involving a large number of class members with similar claims – would be defeated." *Id.*

Over the decades the *American Pipe* doctrine crystallized into a settled expectation that potential class members need *not* intervene in a class action or file their own complaint to preserve their claims, at least until class certification has been denied. In 2002, the Fourth Edition of the leading treatise on class actions stated, "Because the filing of the class complaint tolls the statute of limitations for the class, class members may simply await the outcome of the suit." 5 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 16:6, at 146 (4th ed.

2002) (footnote omitted). But by the time the Fifth Edition was published in 2013, that statement had become a "general rule" followed by 16 sections of caveats and exceptions, as the lower courts considered the bewildering permutations of the *American Pipe* rule in the class action context. *See* 3 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS §§ 9:53 to 9:68 (5th ed. 2013). The 2016 supplement adds a new section addressing the issue raised by this Petition; the authors conclude with the observation that the dismissal of the writ in *Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013), *cert. granted sub nom., Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, 134 S. Ct. 1515 (2014), *cert. dismissed as improvidently granted*, 135 S. Ct. 42 (2014), left "the split in the circuits to be resolved another day." *Id.* § 9:69, at 58 (Supp. 2016).

In *IndyMac*, the Second Circuit held that the *American Pipe* tolling rule does not apply to Section 13's three-year period. 721 F.3d at 101. In the decision below, the court of appeals followed *IndyMac* to dismiss claims that the plaintiff had filed, after opting out of a putative class action, outside of Section 13's three-year period. Pet. App. 1a-6a. If upheld by this Court, the *IndyMac* rule will contribute to the growing confusion about *American Pipe* tolling in class action cases. The effect, *amici* believe, will be a trend toward duplicative filings in securities class action cases, which will complicate their management and administration. *Amici* believe this based on their experience and judgment, for the following reasons.

First and foremost, potential class members will have a strong incentive to file motions to intervene or

separate complaints to ensure that any time limitation characterized as a "statute of repose" is not later held to bar their claims. One research firm reports that the median time from the filing of a securities class action complaint to a decision on class certification is about 2.4 years. Starykh & Boettrich, *supra*, at 20. (The median time between the end of the class period and the filing of the first complaint is only 11 days, but the mean is 68 days. *Id.* at 16.) Another researcher reports that the median time to settlement was three years in 2015, with longer periods for larger cases. Cornerstone Research, *Securities Class Action Settlements – 2015 Review and Analysis* 19 (2016), *available at* http://securities.stanford.edu/research-reports/1996-2015/Settlements-Through-12-2015-Review.pdf. Thus, sophisticated parties know that a three-year statutory period may expire well before the rights of absent class members are adjudicated. Indeed, under the rule followed by the court of appeals below, even if a class is certified within the three-year period, absent class members are not protected if the class is later *decertified* outside the three-year period.

The Second Circuit appears to embrace, or at least be agnostic to, the prospect of multitudinous, duplicative litigation resulting from potential class members filing motions to intervene or separate actions to protect their rights. As the court put it in *IndyMac*, "through minimal diligence, [the proposed intervenors] could have avoided the operation of the Section 13 statute of repose simply by making timely motions to intervene in the action as named plaintiffs, or by filing their own timely actions and, if prudent, seeking to join their claims under Federal Rule of Civil Procedure 20 (joinder)." *Id.* at 112. *Amici*

believe that such a regime would place an undue burden on district courts, and is both unwarranted and undesirable.[5]

Second, as a result of the PSLRA's publication requirement, potential members of securities class actions may receive early notice of the litigation and ready access to counsel. Federal securities class actions are filed and litigated by a plaintiffs' bar that tends to be sophisticated and highly competitive. These lawyers stay abreast of major events in the capital markets, and they are immediately made aware of class action complaints filed by competing plaintiffs' firms. When a securities class action is filed, plaintiffs' lawyers have an obligation, as well as an incentive, to notify potential class members of the action. Many of these potential class members contact one or more of the plaintiffs' firms who are competing to represent the lead plaintiff. Even before the court of appeals' decision in *IndyMac*, law firms

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[5] *Amici* note that, in the Sixth Circuit, the incentive for potential class members to act before the statute of limitations runs, either through early intervention or filing a separate action, is particularly acute. In *Stein v. Regions Morgan Keegan Select High Income Fund*, 821 F.3d 780 (6th Cir. 2016), the Sixth Circuit followed *IndyMac*. However, that circuit has also declined to extend *American Pipe* tolling to a potential class member who files her own action beyond the statute of limitations but before the trial court rules on class certification. *Wyser-Pratte Mgmt. Co. v. Telxon Corp.*, 413 F.3d 553 (6th Cir. 2005). As the court recognized in *Stein*, to protect her rights in the Sixth Circuit, a potential class member currently must either file before the limitations period expires or hope that the district court decides class certification before the "statute of repose" period runs. 821 F.3d at 795 n.6. Any rational potential class member will choose the former, which will lead to more protective filings.

representing investors have sometimes "signed up" thousands of potential class members as part of the initial process of choosing a lead plaintiff. *See, e.g.*, *Network Assocs.*, 76 F. Supp. 2d at 1019 (noting that one law firm claimed to represent a group of more than 1725 investors, and another claimed over 100 institutions and "thousands" of individuals); *Aronson v. McKesson HBOC, Inc.*, 79 F. Supp. 2d 1146, 1154 (N.D. Cal. 1999) ("groups as large as 4,000 plaintiffs strong are vying for appointment" as lead plaintiff); *Takeda v. Turbodyne Techs., Inc.*, 67 F. Supp. 2d 1129, 1135 (C.D. Cal. 1999) (two competing groups of "several hundred investors"); *In re Baan Co.*, 186 F.R.D. at 217 (group of 466); *Chill v. Green Tree Fin. Corp.*, 181 F.R.D. 398, 408-09 (D. Minn. 1998) (roughly 300). If the *IndyMac* rule followed below prevails, it seems likely that plaintiffs' counsel will need to inform potential class members that they *cannot* merely sit by and assume that their rights are protected.

Third, many securities are held through funds operated by professional managers. Investment managers are fiduciaries who have a duty to keep investors informed of rights and opportunities associated with their investments. *See* Restatement (Second) of Trusts § 177 (1959) ("The trustee is under a duty to the beneficiary to take reasonable steps to realize on claims which he holds in trust."). As a result, they are likely to monitor Business Wire and other sites that publish notices of class action filings. After learning of a class action involving securities held by their investors, investment professionals may feel obligated to tell their clients that they should analyze the pleadings to form a legal judgment about whether intervention is advisable. At minimum, this

imposes additional costs on investors, and it could impose substantial burdens on the courts if investment professionals push investors to protect their rights by filing complaints or motions to intervene.

Finally, a lead plaintiff in a securities class action owes a fiduciary duty to the class. *In re Cendant*, 404 F.3d at 198. Class counsel likewise owes a fiduciary duty to putative class members upon the filing of a class complaint. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 801 (3d Cir. 1995). Whether that duty extends to notifying class members about the possible imposition of a time bar is not clear, but again, under the *IndyMac* rule the safer course for a fiduciary may be to notify class members that their claims are not protected against the time limitation unless they file a complaint or motion to intervene. Such an outcome would impose additional costs on plaintiffs or their counsel, who must pay for such notice. Also, adding another notice obligation to those required by the PSLRA and Rule 23 may confuse potential class members about the substance and import of the different notices they receive during a securities class action.

To be sure, under the *IndyMac* rule putative class members could still delay filing a complaint or motion to intervene until just before expiration of the three-year period. However, plaintiffs may decide that the wiser course is to make a protective filing early in the case, rather than monitor the litigation, calendar key dates, and form periodic judgments about whether intervention is advisable. In any case, motions to intervene and separate complaints substantially

burden the courts, regardless of whether they are filed shortly after a complaint or immediately before the expiration of a limitations period.

Amici cannot say how many additional motions to intervene or separate complaints will be filed if the *IndyMac* rule followed below stands. Under the *American Pipe* rule regularly applied prior to the Second Circuit's decision in *IndyMac*, however, virtually none of these putative class members file papers with the court or otherwise participate in the proceedings if they are not selected as lead plaintiff. They have had little reason to do so in light of the longtime understanding that their claims would not be extinguished while the class action proceeds.

III. APPLYING THE RULE OF *AMERICAN PIPE* WOULD MINIMIZE CASE MANAGEMENT ISSUES AND PROMOTE A FAIR RESOLUTION OF SECURITIES CLASS ACTIONS.

As noted *supra*, district judges presiding over securities class actions frequently conclude that the interests of justice and efficiency are served by limiting the number of representative plaintiffs. In *In re Telxon Corp. Securities Litigation*, 67 F. Supp. 2d 803 (N.D. Ohio 1999), for instance, 27 parties filed class action complaints. All agreed that the cases should be consolidated, but three groups competed for lead plaintiff status. One group consisted of 18 individual plaintiffs who alleged collective losses of some $3 million during the class period. Although this amount exceeded the loss of the other candidates, the court declined to name the group as lead plaintiff, reasoning that "[t]he larger the group,

the less incentive any single member of the group—and certainly the group as a whole—will have to exercise any supervision or control over the litigation." *Id.* at 815. Moreover, the court added, "[t]he greater the number of persons comprising the group, the more difficult it is for those persons to communicate with each other, and to speak with a single, coherent voice when making decisions about the conduct of the litigation . . . ." *Id.* at 815-16; *see also In re Cendant Corp. Sec. Litig.*, 264 F.3d 201, 267 (3d Cir. 2001) ("At some point, a group becomes too large for its members to operate effectively as a single unit."); *Enron*, 206 F.R.D. at 442; *Burke v. Ruttenberg*, 102 F. Supp. 2d 1280, 1336-37 (N.D. Ala. 2000) ("the larger the group, the greater the costs"), *vacated on other grounds*, 317 F.3d 1261 (11th Cir. 2003).[6]

If the Second Circuit's approach to Section 13 is sustained, the problem in finding a "single, coherent voice" for the class could become more difficult. The *IndyMac* court foresaw two options for absent class members to preserve their claims: filing a separate complaint (and possibly moving for joinder), or filing a timely motion to intervene. *See* 721 F.3d at 112. Few *pro se* investors have the training and experience

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[6] To be sure, a number of courts have allowed multiple parties to serve in a group as lead plaintiffs. But these cases appear to turn on the cohesiveness of the group. *See, e.g., In re First Union Corp. Sec. Litig.*, 157 F. Supp. 2d 638 (W.D.N.C. 2000). When there are "multiple groups of plaintiffs and institutional investors all vying against each other for appointment as lead plaintiff," then "concerns regarding control of the litigation vis-à-vis the best interests of the class members [are] a relevant inquiry." *Id.* at 643.

to draft a complaint that satisfies the PSLRA's standards. *See* 15 U.S.C. § 78u-4(b)(1)-(2); *Tellabs*, 551 U.S. at 313 ("The PSLRA requires plaintiffs to state with particularity both the facts constituting the alleged violation, and the facts evidencing scienter ...."). Moreover, the fee for filing a complaint in federal court is currently $400—a significant impediment for someone who is simply trying to preserve a claim—whereas there is no fee for filing a motion to intervene. It thus stands to reason that putative class members would be more likely to file motions to intervene.

But motions to intervene are themselves subject to a complex procedure and analysis, and adjudicating scores of them in the class action context could consume substantial resources of the court and the parties. The motion must "state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought." FED. R. CIV. P. 24(c). The movant must meet the standard for intervention, of right or permissive, under Rule 24(a) or (b), respectively. *E.g.*, *DeJulius v. New England Health Care Emps. Pension Fund*, 429 F.3d 935, 942-43 (10th Cir. 2005).[7] Although motions to intervene tend to be granted liberally in class

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[7] Under Rule 23(c)(2)(B)(iv), for classes certified under Rule 23(b)(3), the notice provided to class members after class certification must include a statement that "a class member may enter an appearance through an attorney if the member so desires." This does not mean, however, that absent class members have an automatic right to intervene in Rule 23(b)(3) classes. *See* 7B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1799, at 252-53 (3d ed. 2005).

actions, defendants can and do oppose them, and the case law reflects the many issues that can arise. *E.g.*, *In re Cendant Corp. Sec. Litig.*, 109 F. Supp. 2d 273, 276-79 (D.N.J. 2000) (movant not member of class and thus could not intervene as of right, although permissive intervention granted for limited purpose), *aff'd*, 264 F.3d 286 (3d Cir. 2001); *In re Initial Pub. Offering Sec. Litig.*, 499 F. Supp. 2d 415 (S.D.N.Y. 2007) (intervention to challenge lead counsel would cause undue delay); *Jenkins* v. *Missouri*, 78 F.3d 1270, 1275 (8th Cir. 1996) (no intervention as of right in civil rights class action when named plaintiffs were adequately representing interests of proposed intervenors); *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 315 (3d Cir. 2005) (the "goals of Rule 23 would be seriously hampered" if absent class members "who merely express dissatisfaction with specific aspects of the proposed settlement . . . have the right to intervene").

That many of these putative intervenors are likely to be *pro se* will add to the case management difficulty. In any proceeding, *pro se* parties consume more than their share of judicial and administrative resources. They are often unfamiliar with electronic case filing and local and federal rules designed to expedite litigation; they are difficult to notify; and their papers often must be reviewed with a heightened degree of interpretive leniency, *see, e.g.*, *Haines v. Kerner*, 404 U.S. 519, 520 (1972). *See* J. Rosenbloom, *Exploring Methods to Improve Management and Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York*, 30 FORDHAM URB. L.J. 305, 306-09 & nn.5-19 (2002) (discussing judicial and administrative problems with *pro se* cases). In a complex class action,

managing an influx of *pro se* motions to intervene or separate complaints could occupy substantial judicial resources. Handling *pro se* matters is part of a federal court's function, of course, but it hardly seems a good use of resources when the *pro se* parties' interests are already represented by counsel specifically chosen for their expertise.

The *IndyMac* rule followed below also could complicate discovery and other procedural aspects of litigation that are sometimes awkward and cumbersome in class actions. Typically, discovery from absent class members is "disfavored" (although not flatly prohibited), in part because such discovery would "threaten[] to undermine the efficiency of representative litigation." *See* 3 WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS § 9:11, at 419, 417 (5th ed. 2013) (footnotes omitted). The test for permitting discovery from absent class members is itself complex and nuanced, and frequently disputed. *See id.* §§ 9:12-9:17, pp. 420-429. But even absent class members "can lose their effective immunity from most discovery by becoming actively involved in the litigation." *Id.* § 9:12, at 423. Class members who intervene or file their own complaints presumably would be subject to the full range of discovery devices, just as they could utilize those devices offensively to develop their cases. *See* 7C WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1920 (3d ed. 2007), at 611 ("the intervenor is entitled to litigate fully on the merits once intervention has been granted"). Many proposed intervenors would have little interest in propounding discovery, but they will incur considerable cost and risk if, for instance, they are obligated to make initial disclosures under Rule 26(a) and respond to

interrogatories under Rule 33 or document requests under Rule 34.

In addition, courts often treat absent class members differently from class representatives with respect to counterclaims—a wrench in the class action machinery. Many courts disfavor counterclaims against absent class members for case management and other reasons, including questions of personal jurisdiction over absent members. 3 WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS §§ 9:24-9:28, pp. 456-77. By contrast, courts often permit (and may even require) counterclaims against representative parties. *See id.* § 9:29, pp. 478-81. If absent class members feel impelled to intervene or file separate complaints to preserve their claims, class action defendants will likely react by filing counterclaims against the intervening plaintiffs, where warranted. This can only complicate the litigation for both the parties and the courts.

Finally, the Second Circuit's rule, if upheld, may require district courts to give additional scrutiny to the timing and content of notices required under Rule 23. Members of a class certified under Rule 23(b)(3) must receive notice that the court will exclude from the class any member who requests exclusion. FED. R. CIV. P. 23(c)(2)(B)(v). Likewise, a court may refuse to approve a potential settlement of a class action with a certified Rule 23(b)(3) class unless the proposed settlement "affords a new opportunity to request exclusion to individual class members" who previously did not do so. FED. R. CIV. P. 23(e)(4). Given that one or both of these notices may, and often do, occur after the three-year period in § 13, courts will need to consider whether to accelerate the pace of

securities class action litigation to ensure that any Rule 23 notice occurs in time to make a class member's opt-out rights meaningful. At minimum, when notice goes out to a class beyond the three-year period in § 13, a district court will need to assess whether the notice must alert class members that opting out of the class would end any chance for recovery under the Securities Act because those rights have expired.

Amici reiterate that they are neutral about the substantive issues of securities law raised by the parties in this litigation. Based on their collective experience and judgment, however, *amici* believe that this Court's endorsement of the *IndyMac* rule followed in the decision below would exacerbate district courts' administrative and judicial difficulties in managing securities class actions.

CONCLUSION

For the reasons stated, the Court should grant the petition for a writ of *certiorari* and reverse the decision below.

Respectfully submitted,

ANDREW N. GOLDFARB
Counsel of Record
GRAEME W. BUSH
JOHN J. CONNOLLY
ZUCKERMAN SPAEDER LLP
1800 M Street, NW, Ste. 1000
Washington, DC 20036
202 778 1800
agoldfarb@zuckerman.com

APPENDIX

APPENDIX

List of *Amici*

The Hon. Frank C. Damrell, Jr. (ret.) served on the United States District Court for the Eastern District of California from 1997 to 2011. He served on the Judicial Panel on Multidistrict Litigation from 2008 to 2011. Judge Damrell is currently a principal at Cotchett, Pitre & McCarthy LLP.

The Hon. William Royal Furgeson, Jr. (ret.) served on the United States District Court for the Western District of Texas from 1994 to 2013. He served on the Judicial Panel on Multidistrict Litigation, was President of the Federal Judges Association, and was a member of the Judicial Branch Committee of the Judicial Conference of the United States. Judge Furgeson is currently Dean of the University of North Texas at Dallas College of Law.

The Hon. Nancy Gertner (ret.) served on the United States District Court for the District of Massachusetts from 1994 to 2011. Judge Gertner is currently a Professor of Practice at Harvard Law School.

The Hon. G. Patrick Murphy (ret.) served on the United States District Court for the Southern District of Illinois from 1998 to 2013, including serving as chief judge from 2000 to 2007. Judge Murphy is currently a partner at Murphy & Murphy, LLC.

The Hon. T. John Ward (ret.) served on the United States District Court for the Eastern District of Texas from 1999 to 2011. He served on the Judicial Conference Committee on Court Administration and Court Management from 2003 to 2009. Judge Ward is currently a partner at the Ward & Smith Law Firm.

The Hon. Alexander Williams, Jr. (ret.) served on the United States District Court for the District of Maryland from 1994 to 2014. Judge Williams is currently on the faculty of the Howard University Law School.

RECORD AND BRIEFS

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In The Supreme Court Of The United States

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM,

PETITIONER,

v.

ANZ SECURITIES, INC., ET AL.,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMICUS BRIEF OF THE STATES OF WASHINGTON, ALASKA, CONNECTICUT, HAWAI'I, IOWA, MARYLAND, MICHIGAN, MISSISSIPPI, OREGON, AND VIRGINIA IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

ROBERT W. FERGUSON
Attorney General of Washington

ALAN D. COPSEY
Deputy Solicitor General
Counsel of Record

MARY C. LOBDELL
Senior Counsel

1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6200
alan.copsey@atg.wa.gov

Additional Counsel Listed Following Signature Page

QUESTION PRESENTED

American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974), has governed class action jurisprudence for decades. Under the *American Pipe* rule, a class action complaint "suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Id.* at 552-53. Until the recent Second Circuit decision in *Police & Fire Retirement System of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013), *cert. granted sub nom., Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, 134 S. Ct. 1515 (2014), *cert. dismissed as improvidently granted*, 135 S. Ct. 42 (2014), the States relied upon *American Pipe* to toll the limitations periods for actions under the Securities Act. The Second Circuit again has rejected the *American Pipe* rule in this case, holding that the "statute of repose" in the Securities Act is not tolled. Its decision deepens an existing circuit split and adversely affects the States' efforts to protect the investment of trust and public funds.

This amicus brief addresses the first Question Presented by Petitioner:

> Does the filing of a putative class action serve, under the *American Pipe* rule, to satisfy the three-year time limitation in Section 13 of the Securities Act with respect to the claims of putative class members?

TABLE OF CONTENTS

INTEREST OF AMICI CURIAE 1

REASONS FOR GRANTING THE PETITION 1

A. The Second Circuit's Decision Creates Barriers That Affect the States' Vital Interest in Access to Justice 2

B. The Second Circuit Decision Compels the Filing of Duplicative Litigation to Prevent Claims From Being Time-Barred 7

C. The Second Circuit Decision Impedes Public Access to Justice 10

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Amchem Prods., Inc. v. Windsor,
521 U.S. 591 (1997) 11

American Pipe & Construction Co. v. Utah,
414 U.S. 538 (1974) ..... i, 1-2, 5-6, 9-10

In re Hydrogen Peroxide Antitrust Litig.,
552 F.3d 305 (3d Cir. 2008) 8

In re IndyMac Mortgage-Backed Sec. Litig.,
718 F. Supp. 2d 495 (S.D.N.Y. 2010) 4

In re Initial Pub. Offering Sec. Litig.,
471 F.3d 24 (2d Cir. 2006) 8

In re Lehman Bros. Sec. & ERISA Litig.,
No. 15-879, 2016 WL 3648259 (2d Cir. July 8, 2016) 6

Int'l Fund Mgmt. S.A. v. Citigroup, Inc.,
822 F. Supp. 2d 368 (S.D.N.Y. 2011) 8

Joseph v. Wiles,
223 F.3d 1155 (10th Cir. 2000) 3

Mace v. Van Ru Credit Corp.,
109 F.3d 338 (7th Cir. 1997) 11

Police & Fire Retirement System of City of Detroit v. IndyMac MBS, Inc.,
721 F.3d 95 (2d Cir. 2013) 2-4

Police & Fire Retirement System of City of Detroit v. IndyMac MBS, Inc., 721 F.3d 95 (2d Cir. 2013), *cert. granted sub nom., Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, 134 S. Ct. 1515 (2014), *cert. dismissed as improvidently granted*, 135 S. Ct. 42 (2014) i

Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011) 9

Statutes

15 U.S.C. § 77m (1933) 4

Rules

Fed. R. Civ. P. 23 6-10

Fed. R. Civ. P. 23(a)(1) 9

Fed. R. Civ. P. 23(a)(2) 9

Fed. R. Civ. P. 23(b)(3) 9

Fed. R. Civ. P. 23(c) 6

Fed. R. Civ. P. 23(c)(2)(B) 5, 9

Other Authorities

7A Charles Alan Wright, et al., *Federal Practice and Procedure* § 1787 (4th ed. 2010) 9

Civil Procedure – Class Actions – Second Circuit Holds that American Pipe Class Action Tolling Doctrine Does Not Apply to Statute of Repose in Securities Act of 1933 – Police & Fire Retirement System of Detroit v. IndyMac MBS, Inc., *721 F.3d 95 (2d Cir. 2013)*, 127 Harv. L. Rev. 1501 (Mar. 2014) 8-9

Cornerstone Research, *Securities Class Action Filings, 2015 Year in Review*, https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2015-Year-in-Review.pdf 7

NERA Economic Consulting, *Recent Trends in Securities Class Action Litigation: 2015 Full-Year Review*, http://www.nera.com/publications.html#tab-2 7

Restatement (Second) of Trusts § 177 (1959) 2

Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 Colum. L. Rev. 599 (Apr. 2015) 9

INTEREST OF AMICI CURIAE

Amici States invest billions of dollars of pension funds on behalf of public employees, including teachers and other school employees, law enforcement officers, firefighters, and judges. The States also invest funds that support many public purposes, including public schools, colleges and universities, injured workers, and developmentally disabled persons. Further, state sovereign wealth funds, such as Alaska's Permanent Fund, invest the accumulated proceeds of natural resource extraction for the direct benefit of state residents and to support government operations.

States manage these funds for beneficiaries and the public under various legal principles, including fiduciary principles. In their role as fund managers, the States file and participate in securities litigation, acting as lead plaintiffs in meritorious litigation across the nation. State Attorneys General are on the front lines of recovering lost assets, exposing financial fraud, demanding accountability, and otherwise protecting public funds. States have a vital interest in the petition before this Court to ensure access to justice, to deter corporate abuse, and to efficiently recover lost funds for the benefit of the public and beneficiaries alike.

REASONS FOR GRANTING THE PETITION

The States have relied on the *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), rule for decades in situations similar to the present case. The Second Circuit continues to depart from that decision and deepens the conflict among the Circuits.

The Petitioner, California Public Employees' Retirement System (CalPERS), ably describes the legal errors and circuit conflicts. Rather than reiterate that brief, the amici States seek to highlight how the Second Circuit's decisions impose unnecessary and costly burdens on the States and prompt wasteful and unnecessary litigation that burdens all parties and the courts.

A. The Second Circuit's Decision Creates Barriers That Affect the States' Vital Interest in Access to Justice

By rejecting the *American Pipe* rule, the Second Circuit decision harms the States, imposing duties that needlessly burden the recovery of lost assets for beneficiaries and the public. States, through designated agencies, act as trustees or have trustee-like duties over the assets they manage. As fiduciaries, the States have a duty to take reasonable steps to enforce claims associated with assets they manage. *Restatement (Second) of Trusts* § 177 (1959). *American Pipe* plays a critical role in aiding the States to efficiently manage their fiduciary responsibilities.

Under *American Pipe*, the filing of a class action complaint temporarily suspends applicable statutes of limitation for all class members "who would have been parties had the suit been permitted to continue as a class action." *American Pipe*, 414 U.S. at 554. It creates a consistent rule of law, recognizing both the practicality and the necessity of tolling a limitation period to protect the rights of class members and to promote the efficiency and economy of class action litigation. *Id.* at 553-56.

The Second Circuit's decisions in this case and in *Police & Fire Retirement System of City of Detroit v. IndyMac MBS, Inc. (IndyMac)*, 721 F.3d 95 (2d Cir. 2013), have turned the tables in a circuit that adjudicates a significant number of securities cases. No longer is tolling available to protect putative class member claims facing a statute of repose. *IndyMac*, 721 F.3d at 109. In its wake is a rule that shifts the paradigm of burdens and responsibilities.

Before the Second Circuit's decision in *IndyMac*, the States could rely on representations in pleadings knowing that their interests were protected by tolling should a claim later be dismissed. *See, e.g., Joseph v. Wiles*, 223 F.3d 1155, 1166-67 (10th Cir. 2000). The Second Circuit's decisions in the Petition before the Court and *IndyMac* stripped away such reliance. It shifts onto the States an unreasonable burden of evaluating the veracity of the pleadings and the foundations of claims to predict the risk of a dismissal or a class certification failure. States must evaluate these risks to determine if the litigation protects their interests in light of the unavoidable uncertainty as to how the trial judge ultimately will rule on certification and dismissal. It further impairs the States' ability to opt out of litigation absent the effective monitoring of limitation periods. This increased uncertainty and the heightened diligence impose a significant and unnecessary burden on governments that already face budgetary constraints and competing demands for resources.

IndyMac itself shows why the States can no longer rely on a plaintiff's pleadings. *IndyMac*, 721 F.3d at 112-13. *IndyMac* involved two class actions

in which the District Court consolidated and appointed the Wyoming Treasurer and Wyoming employee pension fund (Wyoming) as the class representative. *Id.* at 102-03. Wyoming then filed an amended consolidated complaint on behalf of other putative class members, asserting claims covering 106 different offerings. *In re IndyMac Mortgage-Backed Sec. Litig. (In re IndyMac)*, 718 F. Supp. 2d 495, 501 (S.D.N.Y. 2010). On the face of the consolidated complaints, class members believed that their claims were included in allegations before the court. The complaint listed the different offerings, the claims, and the theories of liability that established the preliminary scope of the proposed class. *IndyMac*, 721 F.3d at 102.

A dismissal motion by the defendants, filed after the one-year limitation period in Section 13 of the Securities Act (15 U.S.C. § 77m (1933)), showed that Wyoming purchased only 15 of the 106 offerings listed in its amended complaint. *In re IndyMac*, 718 F. Supp. 2d at 501. The trial court found that Wyoming lacked standing to assert claims for securities offerings it had not purchased, and the court dismissed all those claims. *Id.*

Upon learning that the appointed class representative did not purchase the majority of securities pled in the amended complaint, several state and city entities moved to intervene, relying on the *American Pipe* rule. *IndyMac*, 721 F.3d at 103. The court denied the intervenor motions, finding that *American Pipe* did not toll those claims. *Id.* at 109. Without the protection of tolling, the intervenors could not rely on the pleadings and lost their ability to pursue their claims.

The inability to rely on pleadings places the States at a distinct disadvantage. Third parties, not the States, often have knowledge of facts that create a risk of dismissal. These facts often become known only in the later stages of the litigation when dismissal and class certification motions are filed and after the "statute of repose" in Section 13 has run. In that common situation, by the time motions are filed and merits determined, it is too late to protect the public's interest with the benefit of tolling.

That situation is made common by the inherent complexity of securities litigation. It involves multiple parties, facts and legal theories. Any particular case involves risks associated with numerous theories and defenses. Defenses may include safe harbor rules, reliance, lack of class commonality or typicality as well as pleading defects affecting claims or standing. Analyzing and deciphering these factors to weigh the risks associated with a particular litigation is a substantial burden with a significant risk of error, as evidenced in *IndyMac*. By rejecting the *American Pipe* rule, the Second Circuit requires States and other putative class members to bear that risk—or, as discussed below, to respond to that risk by initiating wasteful, duplicative litigation to protect their ability to pursue meritorious claims.

The case before this Court further highlights the additional burdens shifted onto the States by the Second Circuit. Under Federal Rule of Civil Procedure 23(c)(2)(B), class members may participate or withdraw from a class action until they receive notice of the opt-out deadline. *American Pipe*, 414

U.S. at 549. CalPERS never received an opt-out notice, relying on the assurance of Fed. R. Civ. P. 23(c) that a class member may opt out before the exclusion deadline. When CalPERS filed an individual action, the district court dismissed its claims as untimely and the Second Circuit affirmed. *In re Lehman Bros. Sec. & ERISA Litig.*, No. 15-879, 2016 WL 3648259 (2d Cir. July 8, 2016).

Without the protections of Fed. R. Civ. P. 23 and tolling, the Second Circuit's decisions shift onto the States the monitoring of each and every limitation period in every class action in which it may be a putative member, which is contrary to the purposes of the rule. Fed. R. Civ. P. 23 was designed to remedy the practical obstacles and burdens of class action litigation. *See American Pipe*, 414 U.S. at 550. Before *American Pipe*, many courts required class members to show that the limitation period was satisfied on an individual basis. *Id.* Noting the difficulties and unfairness associated with such a requirement, *American Pipe* relieved class members from the burden and disadvantage of evaluating the claims of a class representative and monitoring limitation periods: "Not until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case." *Id.* at 552. The Second Circuit shifts onto the States the very obligations previously mitigated by *American Pipe*.

The sheer number of cases filed each year further amplifies the States' burden, especially if States must monitor and evaluate the pleadings and

progress in each case, rather than rely on *American Pipe*. An average of 188 new securities class actions are filed each year. Cornerstone Research, *Securities Class Action Filings, 2015 Year in Review*, at 4, https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2015-Year-in-Review.pdf (10-year average); *see* NERA Economic Consulting, *Recent Trends in Securities Class Action Litigation: 2015 Full-Year Review*, http://www.nera.com/publications.html#tab-2. The resources needed to evaluate that number of potentially relevant cases places an unnecessary and heavy burden on the States, creating the same harm that Fed. R. Civ. P. 23 sought to prevent. Untethered from necessity, practicality, efficiency, and this Court's precedent, the Second Circuit has increased cost, complexity, and risk for States seeking to responsibly invest, manage, and protect beneficiary and public funds entrusted to them.

B. The Second Circuit Decision Compels the Filing of Duplicative Litigation to Prevent Claims From Being Time-Barred

One way for States to protect the public and beneficiaries from time-barred claims in meritorious cases is to file duplicative litigation. Such an approach, however, runs further astray from the purposes of Fed. R. Civ. P. 23 and substantially increases the overall cost of litigation for the States, the defendants, and the courts.

As the Petition and *IndyMac* demonstrate, the risk of barred claims is significant. Resolutions of issues involving the adequacy, appropriateness, and scope of class representation can be delayed by the

timing of the lawsuit filing, the complexity of the issues, and the motions filed by each party. *See, e.g.*, *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008); *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006); *Int'l Fund Mgmt. S.A. v. Citigroup, Inc.*, 822 F. Supp. 2d 368, 380 (S.D.N.Y. 2011). Delays create significant risks for putative class members, risks that weigh heavily on States tasked with the responsibility of protecting public and beneficiary funds from losses.

A rational response to these risks is to initiate parallel actions or to file motions to intervene in meritorious cases. Although these options mitigate the risk of time-barred claims, they are not without cost. Depositions, document production, and written discovery in these complex cases require significant allocations of public resources.

The devotion of resources and increased costs fall not only on the putative class members that choose to litigate to protect their meritorious claims, but also on the courts and the defendants who must respond in parallel suits. Duplicative litigation wastes judicial resources and adversely affects the efficiencies associated with Fed. R. Civ. P. 23.

Fed. R. Civ. P. 23 was designed to create an aggregative approach to securities litigation. *Civil Procedure – Class Actions – Second Circuit Holds that American Pipe Class Action Tolling Doctrine Does Not Apply to Statute of Repose in Securities Act of 1933 – Police & Fire Retirement System of Detroit v. IndyMac MBS*, Inc., *721 F.3d 95 (2d Cir. 2013)*, 127 Harv. L. Rev. 1501, 1507 (Mar. 2014). A purpose of Fed. R. Civ. P. 23 "[wa]s to funnel as many claims

as possible arising out of a given fraud into a single action managed by a single institutional-investor plaintiff and litigated by a single law firm." *Id.* at 1508. *American Pipe* promoted this purpose. *American Pipe*, 414 U.S. at 550-552. Putative class members were incentivized to await resolution because claims were protected until class certification was resolved or the opt-out deadline passed. *Id.* at 552.

Rather than encouraging the efficient aggregation and resolution of claims, the Second Circuit decision encourages the filing of additional litigation. It incentivizes putative class members to file motions to intervene to protect a class of claims from dismissal while incentivizing others with large claims to file separate litigation to protect opt-out rights.

The Second Circuit's decision also distorts Fed. R. Civ. P. 23 by nullifying the effect and purpose of an opt-out notice. An opt-out notice was designed to preserve the rights of potential class members when interests are in conflict or antagonistic to other class members.[1] *E.g.*, 7A Charles Alan Wright, et al., *Federal Practice and Procedure* § 1787, at 518 (4th ed. 2010). An opt-out notice received after the

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[1] Securities litigation cases are most often certified by the Court under Fed. R. Civ. P. 23(b)(3), which requires an opt-out notice. Fed. R. Civ. P. 23(c)(2)(B). Opt-out notices also may be required under Fed. R. Civ. P. 23(a)(1) and (2) by virtue of the Due Process Clause for claims primarily for money judgments. Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 Colum. L. Rev. 599, 602 (Apr. 2015) (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011)).

limitation period expires, however, is pointless. There is no opt-out right if it does not give putative class members a meaningful right to pursue claims independently. An opt-out notice after the limitation period expires confers only the right to receive "something" by staying in the class or receiving "nothing" by opting-out. Facing the option of "something" or "nothing," a putative class member with significant damages is better off filing separate, duplicative litigation early in the case to protect its rights and to avoid the claim preclusion effect of the litigation.

If separate litigation or intervention is incentivized, the purposes of Fed. R. Civ. P. 23 are thwarted. The *American Pipe* rule, on the other hand, provides balance that protects the interests of class representatives and class members while promoting efficient administration of justice. *American Pipe*, 414 U.S. at 552-55. Because the Second Circuit's decision conflicts with *American Pipe* and disregards Fed. R. Civ. P. 23's purposes, this Court should grant certiorari and reverse the decision.

C. The Second Circuit Decision Impedes Public Access to Justice

Class action litigation is recognized as an effective and efficient means of allowing access to justice for those with small monetary claims that would otherwise not be pursued:

> "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action

> prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

Although the Second Circuit's decisions incentivize large, sophisticated investors to protect their claims by filing separate, duplicative litigation, small investors with similar claims are left unprotected. Small investors typically lack the means to protect their investments. Millions of shareholders hold securities in brokerage accounts throughout the nation. Millions more hold securities in personal 401(k), deferred compensation, and other pension funds. The States have a fundamental interest in ensuring that holders of small claims have a pathway to justice.

Small claim holders will be denied access to justice because the economics do not justify protective litigation, and because they lack the means to monitor or intervene in litigation that affects their claims. Importantly, even large investors like States may hold relatively small investments as part of their diversified portfolios, placing them in the same position as small claimants in securities litigation. Access to the courts will be lost not just to the States, which hold such small claims, but also to those most affected by the loss, the public.

The *American Pipe* rule helps protect access to the courts for small claims in securities litigation. Granting certiorari and reversing the Second Circuit's decision in this case will help maintain a fair and efficient process that allows small claim holders a pathway to adjudicate meritorious claims.

CONCLUSION

The Court should grant the petition for writ of certiorari. The issue of tolling is ripe for review and presents an issue of importance to the States who are entrusted with beneficiary and taxpayer dollars.

RESPECTFULLY SUBMITTED.

ROBERT W. FERGUSON
Attorney General of Washington

ALAN D. COPSEY
Deputy Solicitor General
Counsel of Record

MARY C. LOBDELL
Senior Counsel

1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6200

October 21, 2016

Additional Counsel Listed on Next Page

Additional Counsel:

JAHNA LINDEMUTH
Attorney General of Alaska

GEORGE JEPSEN
Attorney General of Connecticut

DOUGLAS S. CHIN
Attorney General of Hawai'i

TOM MILLER
Attorney General of Iowa

BRIAN E. FROSH
Attorney General of Maryland

BILL SCHUETTE
Attorney General of Michigan

JIM HOOD
Attorney General of Mississippi

ELLEN F. ROSENBLUM
Attorney General of Oregon

MARK HERRING
Attorney General of Virginia

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CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM,
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ANZ SECURITIES, INC., ET AL.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

JOINT APPENDIX

Thomas C. Goldstein
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
tg@goldsteinrussell.com

Counsel of Record
for Petitioners

Victor L. Hou
CLEARY GOTTLIEB STEEN
& HAMILTON LLP
One Liberty Plaza
New York, NY 10006
(212) 225-2000
vhou@cgsh.com

Counsel of Record
for Respondents

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TABLE OF CONTENTS

Relevant Docket Entries (Court Of Appeals) 1

Relevant Docket Entries (CalPERS District Court Docket) 7

Relevant Docket Entries (MDL Docket) 22

Excerpts From Third Amended Class Action Complaint For Violations Of The Securities Laws 50

Excerpts From CalPERS's Complaint For Violation Of The Federal Securities Laws 67

Excerpts From Judgment And Order Approving Settlement Between Lead Class Plaintiffs And The Settling Underwriter Defendants 80

Excerpts From Notice Of Pendency Of Class Action And Proposed Settlement With The Settling Underwriter Defendants, Settlement Fairness Hearing And Motion For Attorneys' Fees And Reimbursement Of Litigation Expenses 89

RELEVANT DOCKET ENTRIES (COURT OF APPEALS)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Case No. 15-1879

Date	#	Docket Text
06/11/2015	1	NOTICE OF CIVIL APPEAL, with district court docket, on behalf of Appellant California Public Employees' Retirement System, FILED. [1531725] [15-1879] [Entered: 06/12/2015 03:09 PM]
06/11/2015	2	DISTRICT COURT ORDER, dated 08/09/2013, RECEIVED.[1531729] [15-1879] [Entered: 06/12/2015 03:13 PM]
06/11/2015	3	DISTRICT COURT ORDER, dated 10/15/2012, RECEIVED.[1531731] [15-1879] [Entered: 06/12/2015 03:13 PM]
06/11/2015	4	DISTRICT COURT ORDER, dated 05/12/2015, RECEIVED.[1531733] [15-1879] [Entered: 06/12/2015 03:14 PM]
09/17/2015	40	BRIEF & SPECIAL APPENDIX, on behalf of Appellant California Public Employees' Retirement System, FILED. Service date 09/17/2015 by

		CM/ECF. [1601395] [15-1879] [Entered: 09/17/2015 08:58 PM]
09/17/2015	41	JOINT APPENDIX, volume 1 of 3, (pp. 1-286), on behalf of Appellant California Public Employees' Retirement System, FILED. Service date 09/17/2015 by CM/ECF.[1601396] [15-1879] [Entered: 09/17/2015 09:03 PM]
09/17/2015	42	JOINT APPENDIX, volume 2 of 3, (pp. 287-572), on behalf of Appellant California Public Employees' Retirement System, FILED. Service date 09/17/2015 by CM/ECF.[1601397] [15-1879] [Entered: 09/17/2015 09:05 PM]
09/17/2015	43	JOINT APPENDIX, volume 3 of 3, (pp. 573-824), on behalf of Appellant California Public Employees' Retirement System, FILED. Service date 09/17/2015 by CM/ECF.[1601398] [15-1879] [Entered: 09/17/2015 09:06 PM]
11/23/2015	63	BRIEF, on behalf of Appellee HVB Capital Markets, Inc., FILED. Service date 10/19/2015 by CM/ECF. [1649161] [15-1879] [Entered: 11/23/2015 04:16 PM]
12/17/2015	67	BRIEF, on behalf of Appellee ANZ Securities, Inc., Bankia, S.A., BBVA Securities Inc., BMO Capital Markets Corp., Fortis Securities,

		LLC, BNP Paribas S.A., BNY Mellon Capital Markets, LLC, CIBC World Markets Corp., Citigroup Global Markets Inc., Daiwa Capital Markets Europe Limited, DZ Financial Markets LLC, HSBC Securities (USA) Inc., ING Financial Markets LLC, Mizuho Securities USA, Inc., Muriel Siebert & Co., Inc., National Australia Capital Markets, LLC, Natixis Bleichroeder Incorporated, RBC Capital Markets Corporation, Greenwich Capital Markets, Inc., RBS WCS Holding Company, Santander Investment Securities Inc., Scotia Capital (USA) Inc., SG Americas Securities Holdings, LLC, Sovereign Securities Corporation, LLC, Suntrust Capital Markets, Inc., Utendahl Capital Partners, L.P., Wells Fargo Securities, LLC and Wachovia Capital Markets, LLC, FILED. Service date 12/17/2015 by CM/ECF. [1667173] [15-1879] [Entered: 12/17/2015 06:57 PM]
01/28/2016	81	REPLY BRIEF, on behalf of Appellant California Public Employees' Retirement System, FILED. Service date 01/28/2016 by CM/ECF. [1694146] [15-1879] [Entered: 01/28/2016 06:04 PM]

03/09/2016	87	ARGUMENT NOTICE, to attorneys/parties, TRANSMITTED.[1723352] [15-1879] [Entered: 03/09/2016 04:30 PM]
03/25/2016	92	FRAP 28(j) LETTER, dated 03/25/2016, on behalf of Appellee ANZ Securities, Inc., Bankia, S.A., BMO Capital Markets Corp., BNP Paribas S.A., BNY Mellon Capital Markets, LLC, CIBC World Markets Corp., Citigroup Global Markets Inc., Daiwa Capital Markets Europe Limited, DZ Financial Markets LLC, HSBC Securities (USA) Inc., ING Financial Markets LLC, Mizuho Securities USA, Inc., Muriel Siebert & Co., Inc., National Australia Capital Markets, LLC, Natixis Bleichroeder Incorporated, RBC Capital Markets Corporation, RBS WCS Holding Company, Santander Investment Securities Inc., Scotia Capital (USA) Inc., SG Americas Securities Holdings, LLC, Sovereign Securities Corporation, LLC, Suntrust Capital Markets, Inc., Utendahl Capital Partners, L.P. and Wells Fargo Securities, LLC, RECEIVED. Service date 03/25/2016 by CM/ECF.[1736757] [15-1879] [Entered: 03/25/2016 05:16 PM]

04/21/2016	95	CASE, before RKW, RCW, GEL, C.JJ., HEARD.[1755283] [15-1879] [Entered: 04/21/2016 11:29 AM]
05/23/2016	97	FRAP 28(j) LETTER, dated 05/23/2016, on behalf of Appellee ANZ Securities, Inc., Bankia, S.A., BMO Capital Markets Corp., BNP Paribas S.A., BNY Mellon Capital Markets, LLC, CIBC World Markets Corp., Citigroup Global Markets Inc., Daiwa Capital Markets Europe Limited, DZ Financial Markets LLC, HSBC Securities (USA) Inc., ING Financial Markets LLC, Mizuho Securities USA, Inc., Muriel Siebert & Co., Inc., National Australia Capital Markets, LLC, Natixis Bleichroeder Incorporated, RBC Capital Markets Corporation, RBS WCS Holding Company, Santander Investment Securities Inc., Scotia Capital (USA) Inc., SG Americas Securities Holdings, LLC, Sovereign Securities Corporation, LLC, Suntrust Capital Markets, Inc., Utendahl Capital Partners, L.P. and Wells Fargo Securities, LLC, RECEIVED. Service date 05/23/2016 by CM/ECF.[1777916] [15-1879] [Entered: 05/23/2016 03:22 PM]
07/08/2016	102	SUMMARY ORDER AND JUDGMENT, affirming the district

		court judgment, by RKW, RCW, GEL, FILED.[1810638] [15-1879] [Entered: 07/08/2016 09:25 AM]
07/29/2016	104	JUDGMENT MANDATE, ISSUED.[1828352] [15-1879] [Entered: 07/29/2016 10:11 AM]
09/26/2016	106	U.S. SUPREME COURT NOTICE of writ of certiorari filing, dated 09/22/2016, U.S. Supreme Court docket # 16-373, RECEIVED.[1870898] [15-1879] [Entered: 09/26/2016 03:22 PM]
01/17/2017	107	U.S. SUPREME COURT NOTICE, dated 01/13/2017, U.S. Supreme Court docket # 16-373, stating the petition for writ of certiorari is granted limited to Question 1 presented by the petition, RECEIVED.[1948921] [15-1879] [Entered: 01/17/2017 03:35 PM]

RELEVANT DOCKET ENTRIES
(CALPERS DISTRICT COURT DOCKET)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CASE #: 1:11-cv-01281-LAK

Date	#	Docket Text
02/07/2011	1	COMPLAINT for Violation of the Federal Securities Laws & Demand for Jury Trial -[Summons Issued] against ABN Amro Inc., Michael L. Ainslie, John F. Akers, Anz Securities, Inc., BBVA Securities Inc., BNP Paribas S.A., BNY Capital Markets, Inc., Roger S. Berlind, CIBC World Markets Corp., Cabrera Capital Markets, LLC, Caja De Ahorros Y Monte De Piedad De Madrid, Erin M. Callan, Citigroup Global Markets Inc., Thomas H. Cruikshank, DZ Financial Markets LLC, Daiwa Securities SMBC Europe Limited, Marsha Johnson Evans, Fortis Securities LLC, Richard S. Fuld, Jr, Sir Christopher Gent, Greenwich Capital Markets, Inc., HSBC Securities (USA) Inc., HVB Capital Markets, Inc., Harris Nesbitt Corp., Roland A. Hernandez, ING Financial Markets LLC, Henry Kaufman, Loop Capital Markets, LLC, M.R. Beal & Company, John D.

		Macomber, Mellon Financial Markets, LLC, Mizuho Securities USA Inc., Muriel Siebert & Co., Inc., Natexis Bleichroeder Inc., National Australia Capital Markets, LLC, Christopher M. O'Meara, RBC Capital Markets Corporation, SG Americas Securities, LLC, Santander Investment Securities Inc., Scotia Capital (USA) Inc., Sovereign Securities Corporation, LLC, Suntrust Capital Markets, Inc., The Williams Capital Group, L.P., Utendahl Capital Partners, L.P., Wachovia Capital Markets, LLC & Wells Fargo Securities, LLC, [Filing Fee: $350.00, Receipt Number 34611056001] Filed by Plaintiff The California Public Employees' Retirement System. (tn, COURT STAFF) (Filed on 2/7/2011) (tnS,). (Additional attachment(s) added on 2/24/2011: # 1 Complaint) (tnS,). [Transferred from California Northern on 2/25/2011.] (Entered: 02/08/2011)
02/24/2011	5	CONDITIONAL TRANSFER ORDER (CTO-14) by The United States Judicial Panel on Multidistrict Litigation TRANSFERRING CASE to the United States District Court for the Sourthern District of New York, MDL No. 2017. (tnS,) (Filed on 2/24/2011) [Transferred from

		California Northern on 2/25/2011.] (Entered: 02/24/2011)
10/07/2011	14	AMENDED COMPLAINT FOR VIOLATION OF THE FEDERAL SECURITIES LAWS amending 1 Complaint against ABN AMRO Inc., ANZ Securities, Inc., Michael L. Ainslie, John F. Akers, BBVA Securities Inc., BNP Paribas S.A., BNY Capital Markets, Inc., Roger S. Berlind, CIBC World Markets Corp., Cabrera Capital Markets, LLC, Caja de Ahorros y Monte de Piedad de Madrid, Erin M. Callan, Citigroup Global Markets Inc., Thomas H. Cruikshank, DZ Financial Markets LLC, Daiwa Securities SMBC Europe Limited, Marsha Johnson Evans, Fortis Securities LLC, Richard S. Fuld, Jr, Sir Christopher Gent, Greenwich Capital Markets, Inc., HSBC Securities (USA) Inc., HVB Capital Markets, Inc., Harris Nesbitt Corp., Roland A. Hernandez, Ing Financial Markets LLC, Henry Kaufman, Loop Capital Markets, LLC, M.R. Beal & Company, John D. Macomber, Mellon Financial Markets, LLC, Mizuho Securities USA Inc., Muriel Siebert & Co., Inc., Natexis Bleichroeder Inc., National Australia Capital Markets, LLC, Christopher M. O'Meara, RBC Capital Markets Corporation, SG

		Americas Securities, LLC, Santander Investment Securities Inc., Scotia Capital (USA) Inc., Sovereign Securities Corporation, LLC, Suntrust Capital Markets, Inc., The Williams Capital Group, L.P., Utendahl Capital Partners, L.P., Wachovia Capital Markets, LLC, Wells Fargo Securities, LLC with JURY DEMAND.Document filed by The California Public Employees' Retirement System. Related document: 1 Complaint filed by The California Public Employees' Retirement System.(lmb) (Entered: 10/14/2011)
01/06/2012	28	MOTION to Dismiss / *Notice of Motion by Bank Defendants to Dismiss Plaintiff's Second Amended Complaint, dated January 6, 2012.* Document filed by ABN AMRO Inc., ANZ Securities, Inc., BBVA Securities Inc., BMO Capital Markets Corp., BNP Paribas S.A., BNY Capital Markets, Inc., CIBC World Markets Corp., Caja de Ahorros y Monte de Piedad de Madrid, Citigroup Global Markets Inc., DZ Financial Markets LLC, Daiwa Securities SMBC Europe Limited, Fortis Securities, LLC, HSBC Securities (USA) Inc., Ing Financial Markets LLC, Loop Capital Markets, LLC, Mellon Financial Markets, LLC,

		Mizuho Securities USA, Inc., Muriel Siebert & Co., Inc., National Australia Capital Markets, LLC, Natixis Bleichroeder Inc., RBC Capital Markets Corp., RBS Greenwich Capital, SG Americas Securities LLC, Santander Investment Securities Inc., Scotia Capital (USA) Inc., Sovereign Securities Corporation LLC, Suntrust Capital Markets, Inc., Utendahl Capital Partners, L.P., Wachovia Capital Markets LLC, Wells Fargo Securities, LLC. Responses due by 2/6/2012Filed In Associated Cases: 1:09-md-02017-LAK, 1:11-cv-01281-LAK(Lowenthal, Mitchell) (Entered: 01/06/2012)
01/06/2012	29	MEMORANDUM OF LAW in Support re: (28 in 1:11-cv-01281-LAK, 557 in 1:09-md-02017-LAK) MOTION to Dismiss / *Notice of Motion by Bank Defendants to Dismiss Plaintiff's Second Amended Complaint, dated January 6, 2012.*. Document filed by ABN AMRO Inc., ANZ Securities, Inc., BBVA Securities Inc., BMO Capital Markets Corp., BNP Paribas S.A., BNY Capital Markets, Inc., CIBC World Markets Corp., Caja de Ahorros y Monte de Piedad de Madrid, Citigroup Global Markets Inc., DZ Financial Markets LLC, Daiwa

		Securities SMBC Europe Limited, Fortis Securities, LLC, HSBC Securities (USA) Inc., Ing Financial Markets LLC, Loop Capital Markets, LLC, Mellon Financial Markets, LLC, Mizuho Securities USA, Inc., Muriel Siebert & Co., Inc., National Australia Capital Markets, LLC, Natixis Bleichroeder Inc., RBC Capital Markets Corp., RBS Greenwich Capital, SG Americas Securities LLC, Santander Investment Securities Inc., Scotia Capital (USA) Inc., Sovereign Securities Corporation LLC, Suntrust Capital Markets, Inc., Utendahl Capital Partners, L.P., Wachovia Capital Markets LLC, Wells Fargo Securities, LLC. Filed In Associated Cases: 1:09-md-02017-LAK, 1:11-cv-01281-LAK(Lowenthal, Mitchell) (Entered: 01/06/2012)
01/06/2012	34	DECLARATION of Brendan H. Gibbon in Support re: (574 in 1:09-md-02017-LAK, 103 in 1:09-cv-01239-LAK, 85 in 1:09-cv-03476-LAK, 86 in 1:09-cv-03474-LAK, 56 in 1:09-cv-06040-LAK, 86 in 1:09-cv-03475-LAK, 89 in 1:09-cv-01944-LAK, 54 in 1:09-cv-06652-LAK, 93 in 1:09-cv-01238-LAK) MOTION to Dismiss / *Notice of Motion by Bank Defendants to Dismiss Plaintiffs' Consolidated First Amended Complaint, dated January*

		6, 2012., (75 in 1:09-cv-01231-LAK, 75 in 1:09-cv-01237-LAK, 78 in 1:09-cv-01235-LAK, 76 in 1:09-cv-01230-LAK, 587 in 1:09-md-02017-LAK, 77 in 1:09-cv-01232-LAK) MOTION to Dismiss / *Notice of Motion by Bank Defendants to Dismiss Plaintiffs' Consolidated First Amended Complaint, dated January 6, 2012.*, (145 in 1:09-cv-02363-LAK, 575 in 1:09-md-02017-LAK) MOTION to Dismiss *Plaintiffs' Second Amended Complaint.*, (52 in 1:09-cv-07877-LAK, 80 in 1:09-cv-01946-LAK, 51 in 1:09-cv-07878-LAK, 568 in 1:09-md-02017-LAK, 77 in 1:09-cv-03467-LAK, 76 in 1:09-cv-03468-LAK, 74 in 1:09-cv-03478-LAK) MOTION to Dismiss /*Notice of Motion by Bank Defendants to Dismiss Plaintiffs' Consolidated First Amended Complaint, dated January 6, 2012.*, (28 in 1:11-cv-01281-LAK, 557 in 1:09-md-02017-LAK) MOTION to Dismiss / *Notice of Motion by Bank Defendants to Dismiss Plaintiff's Second Amended Complaint, dated January 6, 2012.*, (49 in 1:09-cv-06041-LAK, 571 in 1:09-md-02017-LAK) MOTION to Dismiss *Plaintiff's Amended Complaint.*, (570 in 1:09-md-02017-LAK, 25 in 1:11-cv-03892-LAK) MOTION to Dismiss / *Notice of Motion by Bank Defendants to*

		Dismiss Plaintiff's Amended Complaint, dated January 6, 2012.. Document filed by A.G. Edwards & Sons, Inc., ABN AMRO Holding N.V., ABN AMRO Inc., ANZ Securities, Inc., BBVA Securities Inc., BMO Capital Markets Corp., BNP Paribas S.A., BNY Capital Markets, Inc., BNY Mellon Capital Markets, LLC, Banc of America Securities LLC, Banca IMI, S.p.A., CIBC World Markets Corp., Caja de Ahorros y Monte de Piedad de Madrid, Calyon Securities (USA) Inc., Citigroup Global Markets Inc., Commerzbank Capital Markets Corp., Countrywide Securities Corp., DZ Financial Markets LLC, Daiwa Securities SMBC Europe Limited, Edward D. Jones & Co., L.P., Fidelity Capital Markets Services, Fortis Securities, LLC, HSBC Securities (USA) Inc., Hypo Capital Markets, Inc., Ing Financial Markets LLC, LaSalle Financial Services, inc., Loop Capital Markets, LLC, Mellon Financial Markets, LLC, Merrill Lynch, Pierce, Fenner & Smith, Inc., Mizuho Securities USA, Inc., Morgan Stanley & Co. Inc., Muriel Siebert & Co., Inc., National Australia Bank Limited, National Australia Capital Markets, LLC, Natixis Bleichroeder Inc., RBC Capital Markets Corp., RBS

		Greenwich Capital, Raymond James & Associates, Inc., SG Americas Securities LLC, Santander Investment Securities Inc., Scotia Capital (USA) Inc., Siebert Capital Markets, Sovereign Securities Corporation LLC, Standard Chartered Bank, Suntrust Capital Markets, Inc., UBS Securities LLC, Utendahl Capital Partners, L.P., Wachovia Capital Markets LLC, Wells Fargo Securities, LLC, Zions Direct, Inc., UBS Investment Bank, Wachovia Securities. (Attachments: # 1 Exhibits 1-19, # 2 Exhibits 20-28, # 3 Exhibits 29-34, # 4 Exhibits 35-39, # 5 Exhibits 40-41, # 6 Exhibits 42-44)Filed In Associated Cases: 1:09-md-02017-LAK et al.(Cooper, Roger) (Entered: 01/06/2012)
02/13/2012	44	MEMORANDUM OF LAW in Opposition re: (35 in 1:11-cv-01281-LAK, 623 in 1:09-md-02017-LAK) MOTION to Dismiss --*Motions to Dismiss and Joinders in Motions to Dismiss Certain Individual Actions.*, (596 in 1:09-md-02017-LAK) MOTION to Dismiss / *Notice of Motion by HVB Capital Markets Inc. to Dismiss Certain Individual Actions.*, (42 in 1:11-cv-01281-LAK) MOTION to Dismiss / *Notice of Motion by HVB Capital Markets Inc. to Dismiss Certain Individual*

		Actions; "This document was previously served and filed in 09-MD-2017 on 1/6/12 and is now being docketed in this action"., (28 in 1:11-cv-01281-LAK, 557 in 1:09-md-02017-LAK) MOTION to Dismiss / *Notice of Motion by Bank Defendants to Dismiss Plaintiff's Second Amended Complaint, dated January 6, 2012.*, (40 in 1:11-cv-01281-LAK, 659 in 1:09-md-02017-LAK) MOTION to Dismiss - *Joinder to the Bank Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint. Plaintiff CalPERS's Opposition to All Defendants' Motions to Dismiss.* Document filed by The California Public Employees' Retirement System. Filed In Associated Cases: 1:09-md-02017-LAK, 1:11-cv-01281-LAK(Egler, Thomas) (Entered: 02/13/2012)
03/05/2012	49	REPLY MEMORANDUM OF LAW in Support / *Bank Defendants' Reply Memorandum of Law in Further Support of Their Motion to Dismiss Plaintiffs' Second Amended Complaint, dated March 5, 2012 re 557 , 558 and 705 in case no. 09MD2017.* Document filed by ABN AMRO Inc., ANZ Securities, Inc., BBVA Securities Inc., BMO Capital Markets Corp., BNP Paribas S.A., BNY Mellon Capital Markets, LLC,

		CIBC World Markets Corp., Caja de Ahorros y Monte de Piedad de Madrid, Citigroup Global Markets Inc., DZ Financial Markets LLC, Daiwa Securities SMBC Europe Limited, Fortis Securities, LLC, HSBC Securities (USA) Inc., Ing Financial Markets LLC, Loop Capital Markets, LLC, Mellon Financial Markets, LLC, Mizuho Securities USA, Inc., Muriel Siebert & Co., Inc., National Australia Capital Markets, LLC, Natixis Bleichroeder Inc., RBC Capital Markets Corp., RBS Greenwich Capital, SG Americas Securities LLC, Santander Investment Securities Inc., Scotia Capital (USA) Inc., Sovereign Securities Corporation LLC, Suntrust Capital Markets, Inc., Utendahl Capital Partners, L.P., Wachovia Capital Markets LLC, Wells Fargo Securities, LLC. Filed In Associated Cases: 1:09-md-02017-LAK, 1:11-cv-01281-LAK(Hou, Victor) (Entered: 03/05/2012)
12/18/2012	79	PRETRIAL ORDER NO. 51 (Calpers - Motion to Dismiss): granting (557) Motion to Dismiss in case 1:09-md-02017-LAK-GWG; granting; Motion to Dismiss in case 1:11-cv-01281-LAK. As further set forth in this Order, the motions of the Bank Defendants, joined in by Beal,

		Cabrera, and Williams (MDL Dkt. 557) and E&Y (MDL Dkt. 623) to dismiss the complaint are granted to the extent that they rest on alleged misstatements and omissions as to which this Court previously held the third amended complaint in the class action insufficient in Lehman Equity/Debt, and denied in all other respects. The denial is without prejudice to renewal after the disposition of IFM, save that E&Y's motion with respect to the claim based on the May 2008 offering is rejected with prejudice. This order terminates MDL Dkt. 557. It does not terminate MDL Dkt. 596 or MDL Dkt. 623, as they remain pending in certain respects to other cases. The parties shall submit, on or before January 3, 2013, an agreed form of order implementing the decision. (Signed by Judge Lewis A. Kaplan on 12/18/2012) Filed In Associated Cases: 1:09-md-02017-LAK-GWG, 1:11-cv-01281-LAK(ja) (Entered: 12/18/2012)
07/09/2013	108	PRETRIAL ORDER NO. 70 (Calpers-Renewed Motion to Dismiss): Plaintiff California Public Employees' Retirement System ("Calpers") shall file a brief not to exceed 10 pages on or before July 19, 2013 showing cause why the claims asserted in its

		complaint in connection with the May 2008 offering of Lehman 7.5% notes should not be dismissed as time-barred following the Second Circuit's decision in In re Indymac Mortgage-Backed Sec. Litig., No. 11-2998-cv(L). Defendants may file a reply memorandum not to exceed 5 pages no later than July 26, 2013. (Signed by Judge Lewis A. Kaplan on 7/9/2013) Filed In Associated Cases: 1:09-md-02017-LAK-GWG, 1:11-cv-01281-LAK(mro) (Entered: 07/11/2013)
07/19/2013	111	RESPONSE re: (1254 in 1:09-md-02017-LAK-GWG) Pretrial Order,,, *Plaintiff's Response to Pretrial Order No. 70*. Document filed by The California Public Employees' Retirement System. Filed In Associated Cases: 1:09-md-02017-LAK-GWG, 1:11-cv-01281-LAK(Egler, Thomas) (Entered: 07/19/2013)
07/25/2013	112	REPLY MEMORANDUM OF LAW re: (1261 in 1:09-md-02017-LAK-GWG) Response, */Defendants' Reply Memorandum of Law in Response to Pretrial Order Number 70 and in Support of their Renewed Motion to Dismiss Plaintiff's Time-Barred Securities Act Claims, dated July 25, 2013*. Document filed by Bank Defendants. (Attachments:

		# 1 Exhibit A)Filed In Associated Cases: 1:09-md-02017-LAK-GWG, 1:11-cv-01281-LAK(Lowenthal, Mitchell) (Entered: 07/25/2013)
08/09/2013	114	PRETRIAL ORDER NO. 73 (Calpers-Response to Pretrial Order No. 70): The Bank Defendants' motion to dismiss the complaint (MDL Dkt. 557 and 11 Civ. 1281 Dkt. 28) is reinstated and granted as to all Securities Act claims for all securities except those issued in the May 2008 offering substantially for the reasons stated in movants' response to Pretrial Order No. 70 (MDL Dkt. 1265 and 11 Civ. 1281 Dkt 112). Motions terminated: (28 in 1:11-cv-01281-LAK, 557 in 1:09-md-02017-LAK-GWG) MOTION to Dismiss / *Notice of Motion by Bank Defendants to Dismiss Plaintiff's Second Amended Complaint, dated January 6, 2012.* filed by DZ Financial Markets LLC, BMO Capital Markets Corp., Caja de Ahorros y Monte de Piedad de Madrid, RBC Capital Markets Corp., RBS Greenwich Capital, Sovereign Securities Corporation LLC, BNP Paribas S.A., National Australia Capital Markets, LLC, CIBC World Markets Corp., Scotia Capital (USA) Inc., Daiwa Securities SMBC Europe Limited, Ing Financial Markets LLC, BNY Capital

		Markets, Inc., HSBC Securities (USA) Inc., Mellon Financial Markets, LLC, Citigroup Global Markets Inc., Wells Fargo Securities, LLC, Fortis Securities, LLC, ABN AMRO Inc., Suntrust Capital Markets, Inc., BBVA Securities Inc., Natixis Bleichroeder Inc., ANZ Securities, Inc., Loop Capital Markets, LLC, Wachovia Capital Markets LLC, Mizuho Securities USA, Inc., Santander Investment Securities Inc., Muriel Siebert & Co., Inc., SG Americas Securities LLC, Utendahl Capital Partners, L.P. (Signed by Judge Lewis A. Kaplan on 8/9/2013) Filed In Associated Cases: 1:09-md-02017-LAK-GWG, 1:11-cv-01281-LAK(mro) (Entered: 08/12/2013)

RELEVANT DOCKET ENTRIES
(MDL DOCKET)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CASE #: 1:09-md-02017-LAK-GWG

Date	#	Docket Text
01/09/2009	1	PRETRIAL ORDER NO. 1 (Initial Case Management Order)... The following actions are consolidated for all pretrial purposes with 08 Civ. 5523 (LAK): 08 Civ. 5523, 08 Civ. 8225, 08 Civ. 9404, 08 Civ. 9578, 08 Civ. 9793, 08 Civ. 10008, 08 Civ. 10058, and 08 Civ. 10206. They are referred to collectively as In re Lehman Brothers Equity/Debt Securities Litigation. The following actions are consolidated for all purposes into 08 Civ. 6762 (LAK), and the caption of that action is amended to be In re Lehman Brothers Mortgage-Backed Securities Litigation: 08 Civ. 6762 and 08 Civ. 10686. In re Lehman Brothers Equity/Debt Securities Litigation (08 Civ. 5523 (LAK)), In re Lehman Brothers Mortgage-Backed Securities Litigation (08 Civ. 6762) (LAK) and In re Lehman Brothers ERISA Litigation (08 Civ.

		5598 (LAK)) are consolidated for discovery purposes. The Clerk will maintain a master docket and case file under the style In re Lehman Brothers Securities and ERISA Litigation to which he shall assign a file number in the "MD" series... There shall be a single consolidated amended complaint in each of In re Lehman Brothers Equity/Debt Securities Litigation and In re Lehman Brothers Mortgage-Backed Securities Litigation, each of which shall be served and filed no later than 45 days after the date hereof. Defendants thereafter shall answer, move or otherwise response thereto no later than 45 days later... This order resolves, and the clerk shall terminate, the following motions: (Case No. followed by Document Item(s): 08 Civ. 5523 9, 14, 17, 19, 22, 26; 08 Civ. 6762, 21; 08 Civ. 8225 40, 44, 47, 50, 60, 71; 08 Civ. 9404 14, 18, 21, 23, 26, 30; 08 Civ. 9578 9, 14, 17, 19, 22, 26; 08 Civ. 9793 16; 08 Civ. 10008 2, 8; 08 Civ. 10058 4, 8, 11, 13, 16, 20; 08 Civ. 10206 5, 9, 17... and as further set forth in said Pretrial Order No. 1. (Signed by Judge Lewis A. Kaplan on 1/9/09) Filed In Associated Cases: 1:21-mc-00104-LAK et al.(rjm) (Entered: 01/12/2009)

02/23/2009	30	SECOND AMENDED CONSOLIDATED CLASS ACTION COMPLAINT FOR VOILATIONS OF THE FEDERAL SECURITIES LAWS (Jury Trial demanded). Entered as Doc. No. 89 in Case No. 08cv5523, amending 52 Amended Complaint, against Ian Lowitt, Michael L. Ainslie, John F. Akers, Roger S. Berlind, Thomas H. Cruikshank, Marsha Johnson Evans, Christopher Gent, Roland A. Hernandez, Henry Kaufman, John d. Macomber, ABN AMRO Holding N.V., ANZ Securities, Inc., Banc of America Securities LLC, BBVA Securities Inc., BNY Capital Markets, Inc., Cabrera Capital Markets, LLC, Caja de Ahorros y Monte de Piedad de Madrid, CIBC World Markets Corp., Citigroup Global Markets Inc., Daiwa Securities SMBC Europe Limited, DnB NOR Markets, DZ Financial Markets LLC, RBS Greenwich Capital, Harris Nesbitt Corp., HVB Capital Markets, Inc., Loop Capital Markets, LLC, Mellon Financial Markets, LLC, Merrill Lynch, Pierce, Fenner & Smith Inc., Mizuho Securities USA, Inc., Morgan Stanley & Co. Inc., nabCapital Securities, LLC, RBC Dain Rauscher Inc., Santander

		Investment Securities Inc., Siebert Capital Markets, SG Corporate & Investment Banking, Sovereign Securities Corporation, LLC, SunTrust Robinson Humphrey, Inc., UBS Securities LLC, Utendahl Capital Partners, L.P., Wachovia Capital Markets, LLC, Wells Fargo Securities, LLC, William Capital Group, L.P., Richard S. Fuld, Jr, Christopher M. O'Meara, Joseph M. Gregory, Erin Callan.Document filed by Rick Fleischman, Stephen Gott, Island Medical Group, Karim Kano, Michael Karfunkel, Marsha Kosseff, Ann Lee, Francisco Perez, Ronald Profili, Shea-Edwards Limited Partnership, Fred Telling, Grace Wang, Zahniser Trust, Northern Ireland Local Governmental Officers Superannuation Committee, Alameda County Employees' Retirement Association, Government of Guam Retirement Fund, Operating Engineers Local 3 Trust Fund, Police and Fire Retirement System of the City of Detroit, Teamsters Allied Benefit Funds, American European Insurance Company, Inter-Local Pension Fund Graphic Communications Conference of the International Brotherhood of

		Teamsters, Brockton Contributory Retirement System, Belmont Holdings Corp., The City of Edinburgh Council as Administering Authority of the Lothian Pension Fund. Related document: 52 Amended Complaint,,,,,,,, filed by American European Insurance Company, Government of Guam Retirement Fund, Marsha Kosseff, Inter-Local Pension Fund Graphic Communications Conference of the International Brotherhood of Teamsters, The City of Edinburgh Council as Administering Authority of the Lothian Pension Fund, Teamsters Allied Benefit Funds, Alameda County Employees' Retirement Association, Police and Fire Retirement System of the City of Detroit, Operating Engineers Local 3 Trust Fund, Northern Ireland Local Governmental Officers Superannuation Committee, Fire & Police Pension Association of Colorado and Brockton Contributory Retirement System.(rjm) Modified on 3/4/2009 (rjm). (Additional attachment(s) added on 3/11/2009: # 1 Appendix Appendix A, # 2 Appendix Appendix B) (ad). (Entered: 03/04/2009)

04/23/2010	278	THIRD AMENDED COMPLAINT amending 89 (in Case No. 08-5523) Amended Complaint against Ernst & Young LLP, Ian Lowitt, Michael L. Ainslie, John F. Akers, Roger S. Berlind, Thomas H. Cruikshank, Marsha Johnson Evans, Christopher Gent, Roland A. Hernandez, Henry Kaufman, John d. Macomber, ABN AMRO Holding N.V., ANZ Securities, Inc., Banc of America Securities LLC, BBVA Securities Inc., BNY Capital Markets, Inc., Cabrera Capital Markets, LLC, Caja de Ahorros y Monte de Piedad de Madrid, CIBC World Markets Corp., Citigroup Global Markets Inc., Daiwa Securities SMBC Europe Limited, DnB NOR Markets, DZ Financial Markets LLC, RBS Greenwich Capital, Harris Nesbitt Corp., HVB Capital Markets, Inc., Loop Capital Markets, LLC, Mellon Financial Markets, LLC, Merrill Lynch, Pierce, Fenner & Smith Inc., Mizuho Securities USA, Inc., Morgan Stanley & Co. Inc., nabCapital Securities, LLC, RBC Dain Rauscher Inc., Santander Investment Securities Inc., Siebert Capital Markets, SG Corporate & Investment Banking, Sovereign Securities Corporation, LLC,

		SunTrust Robinson Humphrey, Inc., UBS Securities LLC, Utendahl Capital Partners, L.P., Wachovia Capital Markets, LLC, Wells Fargo Securities, LLC, William Capital Group, L.P., M.R. Beal & Company, BNP Paribas S.A., Charles Schwab & Co., Inc., Commerzbank Capital Markets Corp., Edward D. Jones & Co., L.P., Fidelity Capital Markets Services, HSBC Securities (USA) Inc., Incapital LLC, Ing Financial Markets LLC, Muriel Siebert & Co., Inc., Natixis Bleichroeder Inc., Raymond James & Associates, Inc., Scotia Capital (USA) Inc., SG Americas Securities LLC, TD Securities (USA) LLC, UBS Financial Services Inc., BNY Mellon Capital Markets, LLC, Calyon Securities USA Inc, DnB NOR Markets Inc, BMO Capital Markets Corp, National Australia Bank Limited, RBC Capital Markets Corp., Wachovia Securities LLC, The Williams Capital Group LP, Lehman Brothers Holdings, Inc., Richard S. Fuld, Jr, Christopher M. O'Meara, A.G. Edwards & Sons, Inc., Cabrera Capital Markets LLC, DnB NOR Markets Inc., Fortis Securities, LLC, BMO Capital Markets Corp., HSBC Securities (USA) Inc., Merrill

		Lynch, Pierce, Fenner & Smith, Inc., Scotia Capital (USA) Inc., Sovereign Securities Corporation LLC, Standard Chartered Bank, TD Securities (USA) LLC, Wachovia Capital Markets LLC, Wachovia Securities, LLC, The Williams Capital Group L.P., Zions Direct, Inc., Joseph M. Gregory, RBS Securities Inc., Erin Callan.Document filed by Northern Ireland Local Governmental Officers Superannuation Committee, Alameda County Employees' Retirement Association, Government of Guam Retirement Fund, Operating Engineers Local 3 Trust Fund, Police and Fire Retirement System of the City of Detroit, Teamsters Allied Benefit Funds, American European Insurance Company, Inter-Local Pension Fund Graphic Communications Conference of the International Brotherhood of Teamsters, Marsha Kosseff, Brockton Contributory Retirement System, Belmont Holdings Corp., Rick Fleischman, Stephen Gott, Island Medical Group, Karim Kano, Michael Karfunkel, Ann Lee, Francisco Perez, Ronald Profili, Shea-Edwards Limited Partnership, Fred Telling, Grace

		Wang, The City of Edinburgh Council as Administering Authority of the Lothian Pension Fund. Related document: 89 Amended Complaint filed by Zahniser Trust, Island Medical Group, American European Insurance Company, The City of Edinburgh Council as Administering Authority of the Lothian Pension Fund, Grace Wang, Ann Lee, Stephen Gott, Belmont Holdings Corp., Police and Fire Retirement System of the City of Detroit, Operating Engineers Local 3 Trust Fund, Michael Karfunkel, Ronald Profili, Government of Guam Retirement Fund, Fred Telling, Marsha Kosseff, Inter-Local Pension Fund Graphic Communications Conference of the International Brotherhood of Teamsters, Brockton Contributory Retirement System, Karim Kano, Teamsters Allied Benefit Funds, Alameda County Employees' Retirement Association, Shea-Edwards Limited Partnership, Rick Fleischman, Francisco Perez, Northern Ireland Local Governmental Officers Superannuation Committee. Entered as Doc. No. 212 in case no. 08-5523.(rjm) (Entered: 04/30/2010)

12/16/2011	551	SECOND AMENDED COMPLAINT against All Defendants with JURY DEMAND.Document filed by The California Public Employees' Retirement System. (This document has been filed in 11cv1281 as document #26).(pl) (Entered: 12/19/2011)
01/06/2012	557	MOTION to Dismiss / *Notice of Motion by Bank Defendants to Dismiss Plaintiff's Second Amended Complaint, dated January 6, 2012.* Document filed by ABN AMRO Inc., ANZ Securities, Inc., BBVA Securities Inc., BMO Capital Markets Corp., BNP Paribas S.A., BNY Capital Markets, Inc., CIBC World Markets Corp., Caja de Ahorros y Monte de Piedad de Madrid, Citigroup Global Markets Inc., DZ Financial Markets LLC, Daiwa Securities SMBC Europe Limited, Fortis Securities, LLC, HSBC Securities (USA) Inc., Ing Financial Markets LLC, Loop Capital Markets, LLC, Mellon Financial Markets, LLC, Mizuho Securities USA, Inc., Muriel Siebert & Co., Inc., National Australia Capital Markets, LLC, Natixis Bleichroeder Inc., RBC Capital Markets Corp., RBS Greenwich Capital, SG Americas Securities

		LLC, Santander Investment Securities Inc., Scotia Capital (USA) Inc., Sovereign Securities Corporation LLC, Suntrust Capital Markets, Inc., Utendahl Capital Partners, L.P., Wachovia Capital Markets LLC, Wells Fargo Securities, LLC. Responses due by 2/6/2012Filed In Associated Cases: 1:09-md-02017-LAK, 1:11-cv-01281-LAK(Lowenthal, Mitchell) (Entered: 01/06/2012)
01/06/2012	558	MEMORANDUM OF LAW in Support re: (28 in 1:11-cv-01281-LAK, 557 in 1:09-md-02017-LAK) MOTION to Dismiss / *Notice of Motion by Bank Defendants to Dismiss Plaintiff's Second Amended Complaint, dated January 6, 2012*.. Document filed by ABN AMRO Inc., ANZ Securities, Inc., BBVA Securities Inc., BMO Capital Markets Corp., BNP Paribas S.A., BNY Capital Markets, Inc., CIBC World Markets Corp., Caja de Ahorros y Monte de Piedad de Madrid, Citigroup Global Markets Inc., DZ Financial Markets LLC, Daiwa Securities SMBC Europe Limited, Fortis Securities, LLC, HSBC Securities (USA) Inc., Ing Financial Markets LLC, Loop Capital Markets, LLC, Mellon Financial Markets, LLC, Mizuho

		Securities USA, Inc., Muriel Siebert & Co., Inc., National Australia Capital Markets, LLC, Natixis Bleichroeder Inc., RBC Capital Markets Corp., RBS Greenwich Capital, SG Americas Securities LLC, Santander Investment Securities Inc., Scotia Capital (USA) Inc., Sovereign Securities Corporation LLC, Suntrust Capital Markets, Inc., Utendahl Capital Partners, L.P., Wachovia Capital Markets LLC, Wells Fargo Securities, LLC. Filed In Associated Cases: 1:09-md-02017-LAK, 1:11-cv-01281-LAK(Lowenthal, Mitchell) (Entered: 01/06/2012)
01/06/2012	597	DECLARATION of Brendan H. Gibbon in Support re: (574 in 1:09-md-02017-LAK, 103 in 1:09-cv-01239-LAK, 85 in 1:09-cv-03476-LAK, 86 in 1:09-cv-03474-LAK, 56 in 1:09-cv-06040-LAK, 86 in 1:09-cv-03475-LAK, 89 in 1:09-cv-01944-LAK, 54 in 1:09-cv-06652-LAK, 93 in 1:09-cv-01238-LAK) MOTION to Dismiss / *Notice of Motion by Bank Defendants to Dismiss Plaintiffs' Consolidated First Amended Complaint, dated January 6, 2012.*, (75 in 1:09-cv-01231-LAK, 75 in 1:09-cv-01237-LAK, 78 in 1:09-cv-01235-LAK, 76 in 1:09-cv-01230-LAK, 587 in 1:09-md-02017-LAK,

		77 in 1:09-cv-01232-LAK) MOTION to Dismiss / *Notice of Motion by Bank Defendants to Dismiss Plaintiffs' Consolidated First Amended Complaint, dated January 6, 2012.*, (145 in 1:09-cv-02363-LAK, 575 in 1:09-md-02017-LAK) MOTION to Dismiss *Plaintiffs' Second Amended Complaint.*, (52 in 1:09-cv-07877-LAK, 80 in 1:09-cv-01946-LAK, 51 in 1:09-cv-07878-LAK, 568 in 1:09-md-02017-LAK, 77 in 1:09-cv-03467-LAK, 76 in 1:09-cv-03468-LAK, 74 in 1:09-cv-03478-LAK) MOTION to Dismiss /*Notice of Motion by Bank Defendants to Dismiss Plaintiffs' Consolidated First Amended Complaint, dated January 6, 2012.*, (28 in 1:11-cv-01281-LAK, 557 in 1:09-md-02017-LAK) MOTION to Dismiss / *Notice of Motion by Bank Defendants to Dismiss Plaintiff's Second Amended Complaint, dated January 6, 2012.*, (49 in 1:09-cv-06041-LAK, 571 in 1:09-md-02017-LAK) MOTION to Dismiss *Plaintiff's Amended Complaint.*, (570 in 1:09-md-02017-LAK, 25 in 1:11-cv-03892-LAK) MOTION to Dismiss / *Notice of Motion by Bank Defendants to Dismiss Plaintiff's Amended Complaint, dated January 6, 2012.*.

		Document filed by A.G. Edwards & Sons, Inc., ABN AMRO Holding N.V., ABN AMRO Inc., ANZ Securities, Inc., BBVA Securities Inc., BMO Capital Markets Corp., BNP Paribas S.A., BNY Capital Markets, Inc., BNY Mellon Capital Markets, LLC, Banc of America Securities LLC, Banca IMI, S.p.A., CIBC World Markets Corp., Caja de Ahorros y Monte de Piedad de Madrid, Calyon Securities (USA) Inc., Citigroup Global Markets Inc., Commerzbank Capital Markets Corp., Countrywide Securities Corp., DZ Financial Markets LLC, Daiwa Securities SMBC Europe Limited, Edward D. Jones & Co., L.P., Fidelity Capital Markets Services, Fortis Securities, LLC, HSBC Securities (USA) Inc., Hypo Capital Markets, Inc., Ing Financial Markets LLC, LaSalle Financial Services, inc., Loop Capital Markets, LLC, Mellon Financial Markets, LLC, Merrill Lynch, Pierce, Fenner & Smith, Inc., Mizuho Securities USA, Inc., Morgan Stanley & Co. Inc., Muriel Siebert & Co., Inc., National Australia Bank Limited, National Australia Capital Markets, LLC, Natixis Bleichroeder Inc., RBC Capital Markets Corp., RBS

		Greenwich Capital, Raymond James & Associates, Inc., SG Americas Securities LLC, Santander Investment Securities Inc., Scotia Capital (USA) Inc., Siebert Capital Markets, Sovereign Securities Corporation LLC, Standard Chartered Bank, Suntrust Capital Markets, Inc., UBS Securities LLC, Utendahl Capital Partners, L.P., Wachovia Capital Markets LLC, Wells Fargo Securities, LLC, Zions Direct, Inc., UBS Investment Bank, Wachovia Securities. (Attachments: # 1 Exhibits 1-19, # 2 Exhibits 20-28, # 3 Exhibits 29-34, # 4 Exhibits 35-39, # 5 Exhibits 40-41, # 6 Exhibits 42-44)Filed In Associated Cases: 1:09-md-02017-LAK et al.(Cooper, Roger) (Entered: 01/06/2012)
02/13/2012	705	MEMORANDUM OF LAW in Opposition re: (35 in 1:11-cv-01281-LAK, 623 in 1:09-md-02017-LAK) MOTION to Dismiss --*Motions to Dismiss and Joinders in Motions to Dismiss Certain Individual Actions.*, (596 in 1:09-md-02017-LAK) MOTION to Dismiss / *Notice of Motion by HVB Capital Markets Inc. to Dismiss Certain Individual Actions.*, (42 in 1:11-cv-01281-LAK) MOTION to Dismiss / *Notice of*

		Motion by HVB Capital Markets Inc. to Dismiss Certain Individual Actions; "This document was previously served and filed in 09-MD-2017 on 1/6/12 and is now being docketed in this action"., (28 in 1:11-cv-01281-LAK, 557 in 1:09-md-02017-LAK) MOTION to Dismiss / *Notice of Motion by Bank Defendants to Dismiss Plaintiff's Second Amended Complaint, dated January 6, 2012.*, (40 in 1:11-cv-01281-LAK, 659 in 1:09-md-02017-LAK) MOTION to Dismiss - *Joinder to the Bank Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint. Plaintiff CalPERS's Opposition to All Defendants' Motions to Dismiss.* Document filed by The California Public Employees' Retirement System. Filed In Associated Cases: 1:09-md-02017-LAK, 1:11-cv-01281-LAK(Egler, Thomas) (Entered: 02/13/2012)
03/05/2012	771	REPLY MEMORANDUM OF LAW in Support / *Bank Defendants' Reply Memorandum of Law in Further Support of Their Motion to Dismiss Plaintiffs' Second Amended Complaint, dated March 5, 2012 re 557 , 558 and 705 in case no. 09MD2017.* Document filed by ABN AMRO Inc., ANZ Securities, Inc., BBVA Securities Inc., BMO Capital

		Markets Corp., BNP Paribas S.A., BNY Mellon Capital Markets, LLC, CIBC World Markets Corp., Caja de Ahorros y Monte de Piedad de Madrid, Citigroup Global Markets Inc., DZ Financial Markets LLC, Daiwa Securities SMBC Europe Limited, Fortis Securities, LLC, HSBC Securities (USA) Inc., Ing Financial Markets LLC, Loop Capital Markets, LLC, Mellon Financial Markets, LLC, Mizuho Securities USA, Inc., Muriel Siebert & Co., Inc., National Australia Capital Markets, LLC, Natixis Bleichroeder Inc., RBC Capital Markets Corp., RBS Greenwich Capital, SG Americas Securities LLC, Santander Investment Securities Inc., Scotia Capital (USA) Inc., Sovereign Securities Corporation LLC, Suntrust Capital Markets, Inc., Utendahl Capital Partners, L.P., Wachovia Capital Markets LLC, Wells Fargo Securities, LLC. Filed In Associated Cases: 1:09-md-02017-LAK, 1:11-cv-01281-LAK(Hou, Victor) (Entered: 03/05/2012)

04/26/2012	884	**DOCUMENT REFERRED TO JUDGE FOR APPROVAL** - NOTICE OF VOLUNTARY DISMISSAL Pursuant to Rule 41(a)(1)(A)(i) of the Federal Rules of Civil Procedure, the plaintiff(s) and or their counsel(s), hereby give notice that the above-captioned action is voluntarily dismissed, with prejudice against the defendant(s) Michael L. Ainslie, John F. Akers, Roger S. Berlind, Erin M. Callan, Thomas H. Cruikshank, Marsha Johnson Evans, Richard S. Fuld, Jr, Sir Christopher Gent, Roland A. Hernandez, Henry Kaufman, John D. Macomber, Christopher M. O'Meara. Document filed by The California Public Employees' Retirement System. Filed In Associated Cases: 1:09-md-02017-LAK, 1:11-cv-01281-LAK(Egler, Thomas) Modified on 4/27/2012 (dt). (Entered: 04/26/2012)
05/03/2012	900	NOTICE OF DISMISSAL WITH PREJUDICE AS TO THE LEHMAN BROTHERS HOLDINGS INC. DIRECTOR AND OFFICER DEFENDANTS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 41 (a)(1)(A)(i): Plaintiff The California Public Employees' Retirement System, by

		its undersigned attorneys, hereby provides notice that pursuant to the October 14, 2011 Settlement Agreement and Mutual Release, effective as of April 20, 2012, plaintiff dismisses with prejudice all claims and causes of action brought against the following defendants: Richard S. Fuld, Jr., Christopher M. O'Meara, Erin M. Callan, Michael L. Ainslie, John F. Akers, Roger S. Berlind, Thomas H. Cruikshank, Marsha Johnson Evans, Sir Christopher Gent, Roland A. Hernandez, Henry Kaufman and John D. Macomber (collectively, "Settling Defendants"), without costs to any party as against the other. This dismissal is only with respect to the Settling Defendants listed above. Other defendants named in this action are not dismissed. This notice of dismissal with prejudice is made pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) as Settling Defendants have not answered the complaint filed by plaintiff in this action. Reference is also made to the Settlement Agreement and Mutual Release dated October 14, 2011 between plaintiffs and Settling Defendants. (Signed by Judge Lewis A. Kaplan on 5/3/2012)

		Filed In Associated Cases: 1:09-md-02017-LAK, 1:11-cv-01281-LAK(lmb) (Entered: 05/03/2012)
12/18/2012	1104	PRETRIAL ORDER NO. 51 (Calpers - Motion to Dismiss): granting (557) Motion to Dismiss in case 1:09-md-02017-LAK-GWG; granting; Motion to Dismiss in case 1:11-cv-01281-LAK. As further set forth in this Order, the motions of the Bank Defendants, joined in by Beal, Cabrera, and Williams (MDL Dkt. 557) and E&Y (MDL Dkt. 623) to dismiss the complaint are granted to the extent that they rest on alleged misstatements and omissions as to which this Court previously held the third amended complaint in the class action insufficient in Lehman Equity/Debt, and denied in all other respects. The denial is without prejudice to renewal after the disposition of IFM, save that E&Y's motion with respect to the claim based on the May 2008 offering is rejected with prejudice. This order terminates MDL Dkt. 557. It does not terminate MDL Dkt. 596 or MDL Dkt. 623, as they remain pending in certain respects to other cases. The parties shall submit, on or before January 3, 2013, an agreed form of order implementing the decision.

		(Signed by Judge Lewis A. Kaplan on 12/18/2012) Filed In Associated Cases: 1:09-md-02017-LAK-GWG, 1:11-cv-01281-LAK(ja) (Entered: 12/18/2012)
07/09/2013	1253	PRETRIAL ORDER NO. 70 (Calpers-Renewed Motion to Dismiss): Plaintiff California Public Employees' Retirement System ("Calpers") shall file a brief not to exceed 10 pages on or before July 19, 2013 showing cause why the claims asserted in its complaint in connection with the May 2008 offering of Lehman 7.5% notes should not be dismissed as time-barred following the Second Circuit's decision in In re Indymac Mortgage-Backed Sec. Litig., No. 11-2998-cv(L). Defendants may file a reply memorandum not to exceed 5 pages no later than July 26, 2013. (Signed by Judge Lewis A. Kaplan on 7/9/2013) Filed In Associated Cases: 1:09-md-02017-LAK-GWG, 1:11-cv-01281-LAK(mro) (Entered: 07/11/2013)
07/10/2013	1254	PRETRIAL ORDER NO. 70 (Corrected) (Calpers-Renewed Motion to Dismiss): Plaintiff California Public Employees' Retirement System ("Calpers") shall file a brief not to exceed 10

		pages on or before July 19, 2013 showing cause why all claims asserted in its complaint other than those made in connection with the May 2008 offering of Lehman 7.5% notes should not be dismissed as time-barred following the Second Circuit's decision in In re Indymac Mortgage-Backed Sec. Litig., No. 11-2998-cv(L). Defendants may file a reply memorandum not to exceed 5 pages no later than July 26, 2013. (Signed/Corrected by Judge Lewis A. Kaplan on 7/10/2013) Filed In Associated Cases: 1:09-md-02017-LAK-GWG, 1:11-cv-01281-LAK(mro) Modified on 7/11/2013 (mro). (Entered: 07/11/2013)
07/19/2013	1261	RESPONSE re: (1254 in 1:09-md-02017-LAK-GWG) Pretrial Order,,, *Plaintiff's Response to Pretrial Order No. 70.* Document filed by The California Public Employees' Retirement System. Filed In Associated Cases: 1:09-md-02017-LAK-GWG, 1:11-cv-01281-LAK(Egler, Thomas) (Entered: 07/19/2013)
07/25/2013	1265	REPLY MEMORANDUM OF LAW re: (1261 in 1:09-md-02017-LAK-GWG) Response, */Defendants' Reply Memorandum of Law in Response to Pretrial Order Number*

		70 and in Support of their Renewed Motion to Dismiss Plaintiff's Time-Barred Securities Act Claims, dated July 25, 2013. Document filed by Bank Defendants. (Attachments: # 1 Exhibit A)Filed In Associated Cases: 1:09-md-02017-LAK-GWG, 1:11-cv-01281-LAK(Lowenthal, Mitchell) (Entered: 07/25/2013)
08/09/2013	1279	PRETRIAL ORDER NO. 73 (Calpers-Response to Pretrial Order No. 70): The Bank Defendants' motion to dismiss the complaint (MDL Dkt. 557 and 11 Civ. 1281 Dkt. 28) is reinstated and granted as to all Securities Act claims for all securities except those issued in the May 2008 offering substantially for the reasons stated in movants' response to Pretrial Order No. 70 (MDL Dkt. 1265 and 11 Civ. 1281 Dkt 112). Motions terminated: (28 in 1:11-cv-01281-LAK, 557 in 1:09-md-02017-LAK-GWG) MOTION to Dismiss / *Notice of Motion by Bank Defendants to Dismiss Plaintiff's Second Amended Complaint, dated January 6, 2012.* filed by DZ Financial Markets LLC, BMO Capital Markets Corp., Caja de Ahorros y Monte de Piedad de Madrid, RBC Capital Markets Corp., RBS Greenwich Capital, Sovereign Securities Corporation

		LLC, BNP Paribas S.A., National Australia Capital Markets, LLC, CIBC World Markets Corp., Scotia Capital (USA) Inc., Daiwa Securities SMBC Europe Limited, Ing Financial Markets LLC, BNY Capital Markets, Inc., HSBC Securities (USA) Inc., Mellon Financial Markets, LLC, Citigroup Global Markets Inc., Wells Fargo Securities, LLC, Fortis Securities, LLC, ABN AMRO Inc., Suntrust Capital Markets, Inc., BBVA Securities Inc., Natixis Bleichroeder Inc., ANZ Securities, Inc., Loop Capital Markets, LLC, Wachovia Capital Markets LLC, Mizuho Securities USA, Inc., Santander Investment Securities Inc., Muriel Siebert & Co., Inc., SG Americas Securities LLC, Utendahl Capital Partners, L.P. (Signed by Judge Lewis A. Kaplan on 8/9/2013) Filed In Associated Cases: 1:09-md-02017-LAK-GWG, 1:11-cv-01281-LAK(mro) (Entered: 08/12/2013)
09/03/2013	1288	STIPULATION OF VOLUNTARY PARTIAL DISMISSAL AND ORDER: The Court, having considered the parties' Stipulation of Voluntary Dismissal, hereby DISMISSES, with prejudice, Cabrera Capital Markets, LLC as a defendant in claims brought by

		plaintiff The California Public Employees' Retirement System, pursuant to Fed. R. Civ. P. 41(a)(2). Each party shall bear its own fees and expenses. IT IS SO ORDERED. (Signed by Judge Lewis A. Kaplan on 9/03/2013) Filed In Associated Cases: 1:09-md-02017-LAK-GWG, 1:11-cv-01281-LAK(ama) (Entered: 09/03/2013)
01/16/2014	1369	LETTER addressed to Judge Lewis A. Kaplan from Thomas E. Egler dated January 16, 2014 re: settlement with defendant Loop Capital Markets, LLC. Document filed by The California Public Employees' Retirement System.Filed In Associated Cases: 1:09-md-02017-LAK-GWG, 1:11-cv-01281-LAK(Egler, Thomas) (Entered: 01/16/2014)
02/06/2014	1371	STIPULATION OF VOLUNTARY DISMISSAL AND ORDER: The Court, having considered the parties' Stipulation of Voluntary Dismissal, hereby DISMISSES, with prejudice, Loop Capital Markets, LLC as a defendant in claims brought by plaintiff The California Public Employees' Retirement System, pursuant to Fed. R. Civ. P. 41(a)(2). Each party shall bear its own fees and

		expenses., Loop Capital Markets, LLC, Loop Capital Markets, LLC, Loop Capital Markets, LLC and Loop Capital Markets, LLC terminated. (Signed by Judge Lewis A. Kaplan on 2/6/2014) Filed In Associated Cases: 1:09-md-02017-LAK-GWG, 1:11-cv-01281-LAK(lmb) (Entered: 02/06/2014)
06/23/2014	1429	STIPULATION OF VOLUNTARY DISMISSAL AND ORDER: The Court, having considered the parties' Stipulation of Voluntary Dismissal, hereby DISMISSES, with prejudice, Ernst & Young LLP as a Defendant in claims brought by Plaintiff The California Public Employees' Retirement System, pursuant to Fed. R. Civ. P. 41 (a)(2). Each party shall bear its own fees and expenses., Ernst & Young LLP terminated. (Signed by Judge Lewis A. Kaplan on 6/23/2014) Filed In Associated Cases: 1:09-md-02017-LAK-GWG, 1:11-cv-01281-LAK(lmb) (Entered: 06/23/2014)
05/12/2015	1650	STIPULATION OF VOLUNTARY DISMISSAL AND ORDER: NOW THEREFORE, pursuant to Federal Rule of Civil Procedure 41 (a)(2), the parties hereby stipulate to dismiss Defendant Williams from the above-entitled action with

		prejudice. No other party to this action, other than Williams, is being dismissed by this stipulation, and each party is to bear its own costs. The Clerk shall close 11-cv-1281(LAK). The Court, having considered the parties' Stipulation of Voluntary Dismissal, hereby DISMISSES, with prejudice, The Williams Capital Group, L.P. as a Defendant in claims brought by Plaintiff The California Public Employees' Retirement System, pursuant to Fed. R. Civ. P. 41 (a)(2). Each party shall bear its own fees and expenses. The Clerk shall close 11-cv-1281(LAK). (Signed by Judge Lewis A. Kaplan on 5/12/2015) Filed In Associated Cases: 1:09-md-02017-LAK-GWG, 1:11-cv-01281-LAK(lmb) (Entered: 05/12/2015)
06/10/2015	1661	NOTICE OF APPEAL from (1279 in 1:09-md-02017-LAK-GWG, 1279 in 1:09-md-02017-LAK-GWG) Pretrial Order, Terminate Motions,,,,,,,,,,,,. Document filed by The California Public Employees' Retirement System. Filing fee $ 505.00, receipt number 0208-11019641. Form C and Form D are due within 14 days to the Court of Appeals, Second Circuit. Filed In Associated Cases: 1:09-md-02017-LAK-GWG, 1:11-cv-01281-LAK(Egler, Thomas)

		(Entered: 06/10/2015)
07/29/2016	1699	MANDATE of USCA (Certified Copy) as to (139 in 1:11-cv-01281-LAK, 1661 in 1:09-md-02017-LAK-GWG) Notice of Appeal, filed by The California Public Employees' Retirement System. USCA Case Number 15-1879-cv. Ordered, Adjudged and Decreed that the orders of the District Court are AFFIRMED. Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Issued As Mandate: 07/29/2016. Filed In Associated Cases: 1:09-md-02017-LAK-GWG, 1:11-cv-01281-LAK(nd) (Entered: 07/29/2016)

EXCERPTS FROM THIRD AMENDED CLASS ACTION COMPLAINT FOR VIOLATIONS OF THE SECURITIES LAWS

Plaintiffs bring claims arising under the Securities Act individually and on behalf of all persons and entities, except Defendants and their affiliates, who purchased or otherwise acquired the Lehman Brothers Holdings Inc. ("Lehman" or the "Company") securities identified in Appendices A and B attached hereto and who were damaged thereby.

* * *

17. Plaintiffs bring this Action as a class action pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3) on behalf of themselves and all other persons and entities, except Defendants and their affiliates, who (1) purchased or acquired Lehman securities identified in Appendix A pursuant or traceable to the Shelf Registration Statement, (2) purchased or acquired any Lehman Structured Notes identified in Appendix B pursuant or traceable to the Shelf Registration Statement, and (3) purchased or acquired Lehman common stock, call options, and/or who sold Lehman put options between June 12, 2007 and September 15, 2008. Excluded from the Class are (i) Defendants, (ii) the officers and directors of each Defendant, (iii) any entity in which Defendants have or had a controlling interest, and (iv) members of Defendants' immediate families and the legal representatives, heirs, successors or assigns of any such excluded party.

* * *

Violations of Section 11 of The Securities Act
Against the Securities Act Defendants

120. Plaintiffs repeat and reallege each and every allegation contained above as if set forth fully herein and further allege as follows. This Count is based on negligence and strict liability and does not sound in fraud. Any allegations of fraud or fraudulent conduct and/or motive are specifically excluded from this Count.

121. This Count is asserted against Defendants Fuld, O'Meara, Callan, the Director Defendants, E&Y, and the Underwriter Defendants (together, the "Securities Act Defendants") for violations of Section 11 of the Securities Act, 15 U.S.C. § 77k, on behalf of Plaintiffs and all members of the Class who purchased or otherwise acquired the Lehman securities set forth in Appendices A and B pursuant or traceable to the materially false and misleading Shelf Registration Statement and Offering Materials incorporated by reference in the Shelf Registration Statement.

122. The Shelf Registration Statement, including the Offering Materials and Structured Note Offering Materials incorporated by reference therein at the time of each Offering, contained untrue statements of material fact and omitted to state other material facts necessary to make the statements made therein not misleading. The specific documents containing such untrue statements and omissions that were incorporated by reference in the Shelf Registration Statement with regard to each Offering and Structured Note Offering are identified in Appendices A and B.

123. Defendants Fuld, O'Meara and Callan were executive officers and representatives of the Company responsible for the contents and dissemination of the Shelf Registration Statement. Each of the Director Defendants was a director of Lehman at the time the Shelf Registration Statement became effective as to each Offering and Structured Note Offering. Defendants Fuld, O'Meara and Callan signed the Shelf Registration Statement, or documents incorporated by reference, in their capacities as officers or directors of Lehman, and caused and participated in the issuance of the Shelf Registration Statement. By reasons of the conduct alleged herein, each of these Defendants violated Section 11 of the Securities Act.

124. E&Y was the auditor for Lehman. E&Y's audit report, included in Lehman's 2007 10-K and incorporated by reference into the Offering Materials and the Structured Note Offering Materials, falsely certified that Lehman's financial statements were prepared in accordance with GAAP and falsely represented that it conducted its audits or reviews in accordance with GAAS. In addition, E&Y's certifications of Lehman's quarterly financials, included within the Offering Materials and Structured Note Offering Materials, falsely stated that no material modifications of Lehman's financial statements were required for those statements to comply with GAAP, and that E&Y complied with GAAS in conducting its quarterly reviews.

125. The Underwriter Defendants were underwriters of certain of the Offerings set forth in Appendices A and B. The Underwriter Defendants acted negligently and are liable to members of the Class who purchased or otherwise acquired Lehman

securities sold pursuant or traceable to the Offering Materials and Lehman Structured Note Offering Materials for the respective Offerings in which each Underwriter Defendant participated.

126. The Defendants named in this count owed to the purchasers of the securities identified on Appendices A and B the duty to make a reasonable and diligent investigation of the statements contained in the Shelf Registration Statement, and any incorporated documents, at the time each such Offering became effective to ensure that said statements were true and that there were no omissions of material fact which rendered the statements therein materially untrue or misleading. The Securities Act Defendants did not make a reasonable investigation or possess reasonable grounds to believe that the statements contained in the Shelf Registration Statement were true, were without omissions of any material facts, and were not misleading. Accordingly, the Securities Act Defendants acted negligently and are therefore liable to Plaintiffs and members of the Class who purchased or otherwise acquired the securities sold pursuant or traceable to the materially false and misleading Offering Materials and Structured Note Offering Materials for the Offerings set forth on Appendices A and B.

127. Plaintiffs and all members of the Class who purchased or otherwise acquired Lehman securities sold in or traceable to these Offerings did not know of the negligent conduct alleged herein or of the facts concerning the untrue statements of material fact and omissions alleged herein, and by the reasonable exercise of care could not have reasonably discovered such facts or conduct.

128. None of the untrue statements or omissions alleged herein was a forward-looking statement but, rather, each concerned existing facts. Moreover, the Defendants named in this Count did not properly identify any of these untrue statements as forward-looking statements and did not disclose information that undermined the validity of those statements.

129. Less than one year elapsed from the time that Plaintiffs discovered or reasonably could have discovered the facts upon which this Count is based from the time that the initial complaint was filed asserting claims arising out of the Shelf Registration Statement. Less than three years elapsed from the time that the securities upon which this Count is brought were offered in good faith to the public to the time that the initial complaint was filed.

130. Plaintiffs and all members of the Class have sustained damages. The value of the securities sold pursuant or traceable to the Offerings set forth in Appendices A and B has declined substantially due to the Securities Act Defendants' violations of Section 11 of the Securities Act.

131. By reason of the foregoing, the Securities Act Defendants are liable for violations of Section 11 of the Securities Act to Plaintiffs and all members of the Class.

* * *

APPENDIX A

COMMON STOCK/PREFERRED STOCK OFFERINGS

ISSUE DATE	SECURITY (CUSIP)	AMOUNT	PRICE	VOLUME	UNDERWRITER DEFENDANTS[1]	FALSE AND MISLEADING DOCUMENTS INCORPORATED INTO OFFERING MATERIALS	PLAINTIFFS
June 9, 2008	Common Stock (524908100)	143 million shares of common stock	$28 per share	$4,004,000,000		June 12, 2007 Form 8-K July 10, 2007 Form 10-Q September 18, 2007 Form 8-K October 10, 2007 Form 10-Q December 13, 2007 Form 8-K January 29, 2008 Form 10-K March 18, 2008 Form 8-K April 8, 2008 Form 10-Q June 9, 2008 Form 8-K	Brockton Contributory Retirement System; The City of Edinburgh Council on behalf of The Lothian Pension Fund; Government of Guam Retirement Fund; Inter-Local Pension Fund of the Graphic Communications Conference of the International Brotherhood of Teamsters; Northern Ireland Local Government Officers' Superannuantion Committee; Operating Engineers Local 3 Trust Fund; Police and Fire Retirement System of the City of Detroit; Alameda County Employees' Retirement Association

[1] "Underwriter Defendants" refers to: A.G. Edwards & Sons, Inc. (Acquired by Wachovia Securities on October 1, 2007 which was acquired by Wells Fargo on December 31, 2008) ("A.G. Edwards"); ABN Amro Holding N.V. (Acquired by RFS Holdings B.V.) ("ABN Amro"); ANZ Securities, Inc. ("ANZ"); Banc of America Securities LLC ("BOA"); BBVA Securities Inc. ("BBVA"); BNP Paribas S.A. ("BNP Paribas"); BNY Mellon Capital Markets, LLC ("BNY"); Cabrera Capital Markets, LLC ("Cabrera"); Caja de Ahorros y Monte de Piedad de Madrid ("Caja Madrid"); Calyon Securities (USA) Inc. ("Caylon"); Charles Schwab & Co., Inc. ("Charles Schwab"); CIBC World Markets Corp. ("CIBC"); Citigroup Global Markets Inc. ("CGMI"); Commerzbank Capital Markets Corp. ("Commerzbank"); Daiwa Capital Markets Europe Limited (f/k/a Daiwa Securities SMBC Europe Limited) ("Daiwa"); DnB NOR Markets ("DnB NOR"); DZ Financial Markets LLC ("DZ Financial"); Edward D. Jones & Co., L.P. ("E. D. Jones"); Fidelity Capital Markets Services ("Fidelity Capital

(footnote continued on next page)

APPENDIX A

ISSUE DATE	SECURITY (CUSIP)	AMOUNT	PRICE	VOLUME	UNDERWRITER DEFENDANTS[1]	FALSE AND MISLEADING DOCUMENTS INCORPORATED INTO OFFERING MATERIALS	PLAINTIFFS
February 5, 2008 (the "Series J Offering")	7.95% Non-Cumulative Perpetual Preferred Stock, Series J (the "Series J Shares") (52520W317)	75.9 million depositary shares representing 759,000 Series J Shares	$25 per Series J depositary share, or $2,500 per Series J Share	$1,897,500,000	BOA (8,039,988 shares)[2] CGMI (8,112,456 shares) Merrill Lynch (8,040,120 shares) Morgan Stanley (8,039,988 shares) RBC Capital (990,000 shares) SunTrust (990,000 shares) UBS Securities (8,039,988 shares) Wachovia Capital Markets (8,039,988 shares) Wells Fargo (990,000 shares) (continued)	June 12, 2007 Form 8-K July 10, 2007 Form 10-Q September 18, 2007 Form 8-K October 10, 2007 Form 10-Q December 13, 2007 Form 8-K January 29, 2008 Form 10-K	American European Insurance Company; Belmont Holdings Corp.; Brockton Contributory Retirement System; Marsha Kosseff; Alameda County Employees' Retirement Association

Markets"); Fortis Securities LLC ("Fortis"); Harris Nesbitt Corp. ("Harris Nesbitt"); HSBC Securities (USA) Inc. ("HSBC"); HVB Capital Markets, Inc. ("HVB"); Incapital LLC ("Incapital"); ING Financial Markets LLC ("ING"); Loop Capital Markets, LLC ("Loop Capital"); M.R. Beal & Company ("MR Beal"); Mellon Financial Markets. LLC ("Mellon"); Merrill Lynch, Pierce, Fenner & Smith Inc. ("Merrill Lynch"); Mizuho Securities USA, Inc. ("Mizuho"); Morgan Stanley & Co. Inc. ("Morgan Stanley"); Muriel Siebert & Co., Inc., ("Muriel Siebert"); nabCapital Securities, LLC ("nabCapital"); National Australia Bank Ltd. (NAB); Natixis Bleichroeder Inc. ("Natixis"); Raymond James & Associates, Inc. ("Raymond James"); RBC Capital Markets Corporation (f/k/a RBC Dain Rauscher Inc.) ("RBC Capital"); RBS Greenwich Capital ("RBS Greenwich"); Santander Investment Securities Inc. ("Santander"); Scotia Capital (USA) Inc. ("Scotia"); SG Americas Securities LLC ("SG Americas"); Siebert Capital Markets ("Siebert"); Société Générale Corporate and Investment Banking ("Société Générale "); Sovereign Securities Corporation, LLC ("Sovereign"); SunTrust Robinson Humphrey, Inc. ("SunTrust"); TD Securities (USA) LLC ("TD Securities"); UBS Investment Bank ("UBS Investment"); UBS Securities LLC ("UBS Securities"); Utendahl Capital Partners, L.P. (Acquired by Williams Capital Group, L.P. on or about Jan. 10, 2010) ("Utendahl"); Wachovia Capital Finance (Acquired by Wells Fargo Securities, LLC on Dec. 31, 2008) ("Wachovia Capital"); Wachovia Securities (Acquired by Wells Fargo Securities on Dec. 31, 2008) ("Wachovia Securities"); Wells Fargo Securities, LLC ("Wells Fargo"); Williams Capital Group, L.P. ("Williams Capital"). Where Lehman served as an underwriter, it does not appear on this table.

[2] The shares sold by each Underwriter Defendant in the Series J Offering reflect the 66 million depositary shares sold in the initial offering. On information and belief, each underwriter sold an equivalent percentage of the additional shares sold pursuant to the over-allotment.

APPENDIX A

ISSUE DATE	SECURITY (CUSIP)	AMOUNT	PRICE	VOLUME	UNDERWRITER DEFENDANTS[1]	FALSE AND MISLEADING DOCUMENTS INCORPORATED INTO OFFERING MATERIALS	PLAINTIFFS
					ABN Amro (274,956 shares) BNY (274,956 shares) Charles Schwab (274,956 shares) Fidelity Capital Markets (274,956 shares) HSBC (274,956 shares)		
April 4, 2008 (the "Series P Offering")	7.25% Non-Cumulative Perpetual Convertible Preferred Stock, Series P (the "Series P Shares") (525233453)	4 million Series P Shares	$1,000 per Series P Share	$4,000,000,000		June 12, 2007 Form 8-K July 10, 2007 Form 10-Q September 18, 2007 Form 8-K October 10, 2007 Form 10-Q December 13, 2007 Form 8-K January 29, 2008 Form 10-K March 18, 2008 Form 8-K	Brockton Contributory Retirement System; Police and Fire Retirement System of the City of Detroit
June 12, 2008 (the "Series Q Offering")	8.75% Non-Cumulative Mandatory Convertible Preferred Stock, Series Q (the "Series Q Shares") (52520W218)	2 million Series Q Shares	$1,000 per Series Q Share	$2,000,000,000		June 12, 2007 Form 8-K July 10, 2007 Form 10-Q September 18, 2007 Form 8-K October 10, 2007 Form 10-Q December 13, 2007 Form 8-K January 29, 2008 Form 10-K March 18, 2008 Form 8-K April 8, 2008 Form 10-Q June 9, 2008 Form 8-K	Police and Fire Retirement System of the City of Detroit

APPENDIX A

NOTES/BOND OFFERINGS[3]

ISSUE DATE	SECURITY (CUSIP)	VOLUME	UNDERWRITER DEFENDANTS (EXTENT OF PARTICIPATION)	FALSE AND MISLEADING DOCUMENTS INCORPORATED INTO OFFERING MATERIALS	PLAINTIFFS
June 15, 2007	Medium-Term Notes, Series I (52517P2S9)	$35,000,000		June 12, 2007 Form 8-K	Stacey Oyler
July 19, 2007	6% Notes Due 2012 (52517P4C2)	$1,500,000,000	Calyon ($30 million) ING ($30 million) Mellon ($30 million) Scotia ($30 million) Williams Capital ($30 million)	June 12, 2007 Form 8-K July 10, 2007 Form 10-Q	Montgomery County Retirement Board
July 19, 2007	6.50% Subordinated Notes due 2017 (524908R36)	$2,000,000,000	Caja Madrid ($30 million) HSBC ($30 million) HVB ($30 million) National ($30 million) Santander ($30 million) Société Générale ($30 million)	June 12, 2007 Form 8-K July 10, 2007 Form 10-Q	Brockton Contributory Retirement System; Police and Fire Retirement System of the City of Detroit
July 19, 2007	6.875% Subordinated Notes Due 2037 (524908R44)	$1,500,000,000	BBVA ($15 million) BNY ($15 million) CGMI ($15 million) RBS Greenwich ($15 million) RBC Capital ($15 million) SunTrust ($15 million)	June 12, 2007 Form 8-K July 10, 2007 Form 10-Q	Brockton Contributory Retirement System; Police and Fire Retirement System of the City of Detroit; Alameda County Employees' Retirement Association
July 31, 2007	100% Principal Protected Notes Linked to a Basket Consisting of a Foreign Equity Component and a Currency Component (524908K25)	$7,775,000		June 12, 2007 Form 8-K July 10, 2007 Form 10-Q	Fred Telling

[3] The "issue date" identified for the structured notes herein is the settlement date. The pricing date for the structured notes is typically a few days before the settlement date.

APPENDIX A

ISSUE DATE	SECURITY (CUSIP)	VOLUME	UNDERWRITER DEFENDANTS (EXTENT OF PARTICIPATION)	FALSE AND MISLEADING DOCUMENTS INCORPORATED INTO OFFERING MATERIALS	PLAINTIFFS
August 1, 2007	Partial Principal Protection Notes Linked to a Basket of Global Indices (524908J92)	$1,700,000		June 12, 2007 Form 8-K July 10, 2007 Form 10-Q	Stuart Bregman
August 22, 2007	Annual Review Notes with Contingent Principal Protection Linked to an Index (52517P4Y4)	$2,500,000		June 12, 2007 Form 8-K July 10, 2007 Form 10-Q	Irwin and Phyllis Ingwer
August 29, 2007	Medium-Term Notes, Series I (52517P4T5)	$1,000,000		June 12, 2007 Form 8-K July 10, 2007 Form 10-Q	Carla LaGrassa
September 26, 2007	6.2% Notes Due 2014 (52517P5X5)	$2,250,000,000	ANZ ($22.5 million) BBVA ($22.5 million) Cabrera ($22.5 million) CGMI ($22.5 million) Daiwa ($22.5 million) DZ Financial ($22.5 million) Harris Nesbitt ($22.5 million) Mellon ($22.5 million) Mizuho ($22.5 million) Scotia ($22.5 million) Sovereign ($22.5 million) SunTrust ($22.5 million) Utendahl ($22.5 million) Wells Fargo ($22.5 million)	June 12, 2007 Form 8-K July 10, 2007 Form 10-Q September 18, 2007 Form 8-K	Brockton Contributory Retirement System

APPENDIX A

ISSUE DATE	SECURITY (CUSIP)	VOLUME	UNDERWRITER DEFENDANTS (EXTENT OF PARTICIPATION)	FALSE AND MISLEADING DOCUMENTS INCORPORATED INTO OFFERING MATERIALS	PLAINTIFFS
September 26, 2007	7% Notes Due 2027 (52517P5Y3)	$1,000,000,000	ANZ ($10 million) BBVA ($10 million) Cabrera ($10 million) CGMI ($10 million) Daiwa ($10 million) DZ Financial ($10 million) Harris Nesbitt ($10 million) Mellon ($10 million) Mizuho ($10 million) Scotia ($10 million) Sovereign ($10 million) SunTrust ($10 million) Utendahl ($10 million) Wells Fargo ($10 million)	June 12, 2007 Form 8-K July 10, 2007 Form 10-Q September 18, 2007 Form 8-K	Inter-Local Pension Fund of the Graphic Communications Conference of the International Brotherhood of Teamsters; Teamsters Allied Benefit Funds
December 5, 2007	Medium-Term Notes, Series I (5252M0AU1)	$8,000,000		June 12, 2007 Form 8-K July 10, 2007 Form 10-Q September 18, 2007 Form 8-K October 10, 2007 Form 10-Q	Francisco Perez
December 7, 2007	Medium-Term Notes, Series I (5252M0AW7)	$3,000,000		June 12, 2007 Form 8-K July 10, 2007 Form 10-Q September 18, 2007 Form 8-K October 10, 2007 Form 10-Q	Francisco Perez

APPENDIX A

ISSUE DATE	SECURITY (CUSIP)	VOLUME	UNDERWRITER DEFENDANTS (EXTENT OF PARTICIPATION)	FALSE AND MISLEADING DOCUMENTS INCORPORATED INTO OFFERING MATERIALS	PLAINTIFFS
December 21, 2007	6.75% Subordinated Notes Due 2017 (5249087M6)	$1,500,000,000	ABN Amro ($15 million) ANZ ($15 million) BBVA ($15 million) BNY ($15 million) CGMI ($15 million) CIBC ($15 million) HSBC ($15 million) HVB ($15 million) Mizuho ($15 million) Santander ($15 million) Scotia ($15 million) Siebert ($15 million) SunTrust ($15 million) Wachovia Securities ($15 million) Wells Fargo($15 million)	June 12, 2007 Form 8-K July 10, 2007 Form 10-Q September 18, 2007 Form 8-K October 10, 2007 Form 10-Q December 13, 2007 Form 8-K	Brockton Contributory Retirement System; Inter-Local Pension Fund of the Graphic Communications Conference of the International Brotherhood of Teamsters
December 28, 2007	Medium-Term Notes, Series I (5252M0AY3)	$32,000,000		June 12, 2007 Form 8-K July 10, 2007 Form 10-Q September 18, 2007 Form 8-K October 10, 2007 Form 10-Q December 13, 2007 Form 8-K	Island Medical Group PC Retirement Trust f/b/o Irwin Ingwer; Stuart Bregman; Irwin and Phyllis Ingwer; Robert Feinerman
January 22, 2008	5.625% Notes Due 2013 (5252M0BZ9)	$4,000,000,000	BBVA ($40 million) BNP Paribas ($40 million) CGMI ($40 million) Commerzbank ($40 million) Daiwa ($40 million) Fortis ($40 million) ING ($40 million) Mellon ($40 million) MR Beal ($40 million) Natixis ($40 million) SG Americas ($40 million) SunTrust ($40 million) Wells Fargo ($40 million)	June 12, 2007 Form 8-K July 10, 2007 Form 10-Q September 18, 2007 Form 8-K October 10, 2007 Form 10-Q December 13, 2007 Form 8-K	Brockton Contributory Retirement System; Police and Fire Retirement System of the City of Detroit

APPENDIX A

ISSUE DATE	SECURITY (CUSIP)	VOLUME	UNDERWRITER DEFENDANTS (EXTENT OF PARTICIPATION)	FALSE AND MISLEADING DOCUMENTS INCORPORATED INTO OFFERING MATERIALS	PLAINTIFFS
January 30, 2008	Medium-Term Notes, Series I (5252M0BX4)	$28,000,000		June 12, 2007 Form 8-K July 10, 2007 Form 10-Q September 18, 2007 Form 8-K October 10, 2007 Form 10-Q December 13, 2007 Form 8-K January 29, 2008 Form 10-K	Irwin and Phyllis Ingwer; Robert Feinerman
February 5, 2008	Lehman Notes, Series D (52519FFE6)	$43,895,000	A.G. Edwards BOA Charles Schwab CGMI E. D. Jones Fidelity Capital Incapital Morgan Stanley Muriel Siebert Raymond James RBC Capital UBS Investment Wachovia Securities	June 12, 2007 Form 8-K July 10, 2007 Form 10-Q September 18, 2007 Form 8-K October 10, 2007 Form 10-Q December 13, 2007 Form 8-K January 29, 2008 Form 10-K	John Buzanowski
February 14, 2008	Medium-Term Notes, Series I Principal Protected Notes Linked to MarQCuS Portfolio A (USD) Index (5252M0DK0)	$14,600,000		June 12, 2007 Form 8-K July 10, 2007 Form 10-Q September 18, 2007 Form 8-K October 10, 2007 Form 10-Q December 13, 2007 Form 8-K January 29, 2008 Form 10-K	Irwin and Phyllis Ingwer
February 20, 2008	Buffered Return Enhanced Notes Linked to the Financial Select Sector SPDR Fund (5252M0DH7)	$2,325,000		June 12, 2007 Form 8-K July 10, 2007 Form 10-Q September 18, 2007 Form 8-K October 10, 2007 Form 10-Q December 13, 2007 Form 8-K January 29, 2008 Form 10-K	Fred Telling; Stuart Bregman; Irwin and Phyllis Ingwer; Robert Feinerman

APPENDIX A

ISSUE DATE	SECURITY (CUSIP)	VOLUME	UNDERWRITER DEFENDANTS (EXTENT OF PARTICIPATION)	FALSE AND MISLEADING DOCUMENTS INCORPORATED INTO OFFERING MATERIALS	PLAINTIFFS
February 27, 2008	Medium-Term Notes, Series I (5252M0CQ8)	$15,000,000		June 12, 2007 Form 8-K July 10, 2007 Form 10-Q September 18, 2007 Form 8-K October 10, 2007 Form 10-Q December 13, 2007 Form 8-K January 29, 2008 Form 10-K	Irwin and Phyllis Ingwer
March 13, 2008	Medium-Term Notes, Series I (5252M0EH6)	$23,000,000		June 12, 2007 Form 8-K July 10, 2007 Form 10-Q September 18, 2007 Form 8-K October 10, 2007 Form 10-Q December 13, 2007 Form 8-K January 29, 2008 Form 10-K	Robert Feinerman
April 21, 2008	Medium-Term Notes, Series I (5252M0EY9)	$13,000,000		June 12, 2007 Form 8-K July 10, 2007 Form 10-Q September 18, 2007 Form 8-K October 10, 2007 Form 10-Q December 13, 2007 Form 8-K January 29, 2008 Form 10-K March 18, 2008 Form 8-K April 8, 2008 Form 10-Q	Francisco Perez
April 21, 2008	Medium-Term Notes, Series I (5252M0FA0)	$20,000,000		June 12, 2007 Form 8-K July 10, 2007 Form 10-Q September 18, 2007 Form 8-K October 10, 2007 Form 10-Q December 13, 2007 Form 8-K January 29, 2008 Form 10-K March 18, 2008 Form 8-K April 8, 2008 Form 10-Q	Steven Ratnow

APPENDIX A

ISSUE DATE	SECURITY (CUSIP)	VOLUME	UNDERWRITER DEFENDANTS (EXTENT OF PARTICIPATION)	FALSE AND MISLEADING DOCUMENTS INCORPORATED INTO OFFERING MATERIALS	PLAINTIFFS
April 24, 2008	6.875% Notes Due 2018 (5252M0FD4)	$2,500,000,000	BOA ($25 million) BNY ($25 million) CGMI ($25 million) DnB NOR ($25 million) HSBC ($25 million) nabCapital ($25 million) Scotia ($25 million) Soveriegn ($25 million) SunTrust ($25 million) TD Securities ($25 million) Wells Fargo ($25 million) Williams Capital ($25 million)	June 12, 2007 Form 8-K July 10, 2007 Form 10-Q September 18, 2007 Form 8-K October 10, 2007 Form 10-Q December 13, 2007 Form 8-K January 29, 2008 Form 10-K March 18, 2008 Form 8-K April 8, 2008 Form 10-Q	Inter-Local Pension Fund of the Graphic Communications Conference of the International Brotherhood of Teamsters; Government of Guam Retirement Fund
April 29, 2008	Lehman Notes, Series D (52519FFM8)	$7,876,000	A.G. Edwards BOA Charles Schwab CGMI E. D. Jones Fidelity Capital Incapital Morgan Stanley Muriel Siebert Raymond James RBC Capital UBS Investment Wachovia Securities	June 12, 2007 Form 8-K July 10, 2007 Form 10-Q September 18, 2007 Form 8-K October 10, 2007 Form 10-Q December 13, 2007 Form 8-K January 29, 2008 Form 10-K March 18, 2008 Form 8-K April 8, 2008 Form 10-Q	Ann Lee
May 7, 2008	Buffered Semi-Annual Review Notes Linked to the Financial Select Sector SPDR® Fund (5252M0FR3)	$2,550,000		June 12, 2007 Form 8-K July 10, 2007 Form 10-Q September 18, 2007 Form 8-K October 10, 2007 Form 10-Q December 13, 2007 Form 8-K January 29, 2008 Form 10-K March 18, 2008 Form 8-K April 8, 2008 Form 10-Q	Sydney Ratnow

APPENDIX A

Issue Date	Security (CUSIP)	Volume	Underwriter Defendants (Extent of Participation)	False and Misleading Documents Incorporated into Offering Materials	Plaintiffs
May 9, 2008	7.50% Subordinated Notes Due 2038 (5249087N4)	$2,000,000,000	Cabrera ($20 million) Loop Capital ($20 million) Williams Capital ($20 million)	June 12, 2007 Form 8-K July 10, 2007 Form 10-Q September 18, 2007 Form 8-K October 10, 2007 Form 10-Q December 13, 2007 Form 8-K January 29, 2008 Form 10-K March 18, 2008 Form 8-K April 8, 2008 Form 10-Q	Inter-Local Pension Fund of the Graphic Communications Conference of the International Brotherhood of Teamsters
May 19, 2008	Medium-Term Notes, Series I (5252M0FH5)	$3,000,000		June 12, 2007 Form 8-K July 10, 2007 Form 10-Q September 18, 2007 Form 8-K October 10, 2007 Form 10-Q December 13, 2007 Form 8-K January 29, 2008 Form 10-K March 18, 2008 Form 8-K April 8, 2008 Form 10-Q	Island Medical Group PC Retirement Trust f/b/o Irwin Ingwer
June 13, 2008	Annual Review Notes with Contingent Principal Protection Linked to the S&P 500® Index (5252M0GM3)	$4,488,000		June 12, 2007 Form 8-K July 10, 2007 Form 10-Q September 18, 2007 Form 8-K October 10, 2007 Form 10-Q December 13, 2007 Form 8-K January 29, 2008 Form 10-K March 18, 2008 Form 8-K April 8, 2008 Form 10-Q June 9, 2008 Form 8-K	Island Medical Group PC Retirement Trust f/b/o Irwin Ingwer

APPENDIX A

ISSUE DATE	SECURITY (CUSIP)	VOLUME	UNDERWRITER DEFENDANTS (EXTENT OF PARTICIPATION)	FALSE AND MISLEADING DOCUMENTS INCORPORATED INTO OFFERING MATERIALS	PLAINTIFFS
June 26, 2008	Medium-Term Notes, Series I (5252M0GN1)	$25,000,000		June 12, 2007 Form 8-K July 10, 2007 Form 10-Q September 18, 2007 Form 8-K October 10, 2007 Form 10-Q December 13, 2007 Form 8-K January 29, 2008 Form 10-K March 18, 2008 Form 8-K April 8, 2008 Form 10-Q June 9, 2008 Form 8-K June 16, 2008 Form 8-K	Michael Karfunkel

EXCERPTS FROM CALPERS'S COMPLAINT FOR VIOLATION OF THE FEDERAL SECURITIES LAWS

PARTIES

18. Plaintiff CalPERS is the largest public employee retirement system in the United States, with assets of approximately $218 billion and nearly 1.6 million beneficiaries, including active and retired public employees. CalPERS purchased Lehman securities as described below and was damaged thereby. CalPERS purchased the following Lehman common stock and notes (the "Lehman Notes") during the Relevant Period:

Lehman Common Stock	3,893,586 shares
Lehman Brothers Holdings Inc. 7.50% Subordinated Notes Due 2038	$341,075,000
Lehman Brothers Holdings Inc. 6.875% Subordinated Notes Due 2037	$176,000,000
Lehman Brothers Holdings Inc. 6.75% Subordinated Notes Due 2017	$775,000
Lehman Brothers Holdings Inc. 6.50% Subordinated Notes Due 2017	$101,140,000
Lehman Brothers Holdings Inc. Medium Term 7% Notes Due September 27, 2027	$81,000,000
Lehman Brothers Holdings Inc. Medium Term 5.625% Notes Due January 24, 2013	$3,300,000

Relevant Non-Parties

19. Lehman was a corporation organized under the laws of the state of Delaware with its headquarters located at 1271 Avenue of Americas, New York, New York. Lehman operated as a global investment bank and purported to be "an innovator in global finance" with a "leadership position in equity and fixed income sales, trading and research." Lehman's common stock traded on the New York Stock Exchange. On September 15, 2008, Lehman filed a voluntary petition for bankruptcy protection under Chapter 11 of the Bankruptcy Code. For this reason, Lehman is not named as a defendant in this action.

20. LBI, based in New York, New York, was a wholly-owned subsidiary of Lehman and operated as a registered broker-dealer under the 1934 Act. LBJ's services included brokerage, mergers and acquisitions and restructuring advice, debt and equity underwriting, market making, debt and equity research, and real estate and private equity investments. On September 17, 2008, the Securities Investor Protection Corporation moved for an order commencing liquidation and protection under the automatic stay provisions of the Bankruptcy Code. The Bankruptcy Court granted the request on September 19, 2008. For this reason, LBI is not named as a defendant in this action.

Defendants

* * *

35. Defendant Cabrera Capital Markets, LLC ("Cabrera") is an investment bank and full-service institutional brokerage firm which provides services worldwide to a substantial and diversified client base

that includes financial institutions, unions, governments, corporations, hedge funds, and foundations/endowments. Cabrera is based in Chicago, Illinois. Cabrera was an underwriter of the 7.50% Notes offering and the 7.0% Notes offering.

36. The Williams Capital Group, L.P. ("Williams Capital") is an investment bank providing institutional investors and corporate, governmental, and municipal clients with products and services in equities, fixed income, corporate finance, investment management and private equity. Williams Capital is based in New York, New York. Williams Capital was an underwriter of the 7.50% Notes offering.

37. Defendant Loop Capital Markets, LLC ("Loop") is a boutique investment banking and brokerage firm. The firm offers corporate and public finance, financial advisory, municipal finance, equity research, and securities sales and trading services. Loop is based in Chicago, Illinois. Loop was an underwriter of the 7.50% Notes offering.

38. Defendant BBV A Securities Inc. ("BBVA") is a security broker/dealer which provides securities brokerage and research services. BBV A is based in New York, New York. BBVA was an underwriter of the 6.875% Notes offering, the 6.75% Notes offering, the 7% Notes offering and the 5.625% Notes offering.

39. Defendant BNY Capital Markets, Inc. ("BNY") is a boutique investment banking firm that offers corporate finance advisory services and fixed-income securities. BNY is a subsidiary of The Bank of New York Mellon Corporation. BNY was an underwriter of the 6.875% Notes offering and the 6.75% Notes offering.

40. Defendant Citigroup Global Markets Inc. ("CGMI") is a large integrated financial services institution that through subsidiaries and divisions provides commercial and investment banking services, commercial loans to corporate entities, and acts as underwriter in the sale of corporate securities. CGMI was an underwriter of the 6.875% Notes offering, the 6.75% Notes offering, the 5.625% Notes offering and the 7% Notes offering.

41. Defendant RBC Capital Markets Corporation ("RBC Capital") offers corporate and investment banking services to corporations, governments, and institutions. The firm's services include public and private placement of debt and equity securities, strategic alliances, mergers and acquisitions advice, corporate finance, equity and debt underwriting, and structured and project finance. RBC Capital is based in Toronto, Canada. RBC Capital was an underwriter of 6.875% Notes offering.

42. Defendant Greenwich Capital Markets, Inc. ("Greenwich"), now-known as RBS Securities, Inc., is the Royal Bank of Scotland Group's U.S. investment bank/broker-dealer that specializes in fixed income arbitrage and other fixed income strategies. Greenwich is based in Stamford, Connecticut. Greenwich was an underwriter of the 6.875% Notes offering.

43. Defendant SunTrust Capital Markets, Inc. ("SunTrust") is a full-service investment banking and capital markets company that provides capital raising, strategic advisory, risk management, and investment solutions to corporate clients across the nation. SunTrust was an underwriter of the 6.875% Notes

offering, the 7% Notes offering and the 5,625% Notes offering.

44. Defendant ABN AMRO Inc. ("ABN") provides investment advice and related services regarding securities, fixed income, and futures products. ABN provides its services to financial institutions, corporations, governments, fiduciaries, individual investors, professional investors, and securities and commodities dealers. ABN operates as a subsidiary of ABN AMRO Bank N.V. ABN was an underwriter of the 6.75% Notes offering.

45. Defendant ANZ Securities, Inc. ("ANZ") is a boutique investment banking firm that offers financial advisory services. The firm provides merger and acquisition, trade finance, export finance, structured finance, corporate banking, currency options, and structured credit derivatives. ANZ operates as a subsidiary of ANZ Bank based in Melbourne, Australia. ANZ is headquartered in New York, New York. ANZ was an underwriter of the 6.75% Notes offering and the 7% Notes offering.

46. Defendant CIBC World Markets Corp. ("CIBC") is the investment banking subsidiary of the Canadian Imperial Bank of Commerce. The firm operates as an investment bank both in the domestic and international equity and debt capital markets. CIBC is headquartered in Toronto, Ontario. CIBC was an underwriter of the 6.75% Notes offering.

47. Defendant HSBC Securities (USA) Inc. ("HSBC") is an investment banking firm that provides financial advisory services. The firm's services include mergers and acquisitions, capital raising, privatization, and strategic advice. HSBC operates as

a subsidiary of HSBC Investments (North America) Inc. HSBC was an underwriter of the 6.75%.Notes offering and the 6.50% Notes offering.

48. Defendant HVB Capital Markets, Inc. ("HVB") is a securities broker/dealer. HVB was an underwriter of the 6.75% Notes offering and the 6.50% Notes offering.

49. Defendant Caj a de Ahorros y Monte de Piedad de Madrid ("Caj a Madrid") operates as a savings bank in Spain. It primarily offers products and services in banking, insurance, and asset management and brokerage sectors. Caja Madrid provides an array of products and services, including guarantees, credit lines, loans, leasing products, bill discounting, mutual funds, factoring, customized financing, financial advice, and foreign trade operations. Caja Madrid was an underwriter of the 6.50% Notes offering.

50. Defendant National Australia Capital Markets, LLC ("NACM") is a securities broker/dealer. NACM was an underwriter of the 6.50% Notes offering.

51. Defendant Santander Investment Securities Inc. ("Santander") is a securities and money management firm that offers full securities brokerage services, including retail and institutional sales, trading, investment banking, asset management and research. Santander is the U.S. retail securities broker-dealer arm of Grupo Santander, the largest financial group in Spain and Latin America. Santander was an underwriter of the 6.50% Notes offering.

52. Defendant BNP Paribas S.A. ("BNP") is a France-based bank group with operations throughout

the world. BNP was an underwriter of the 5.625% Notes offering.

53. Defendant ING Financial Markets LLC ("ING") offers investment banking and corporate financial services. ING is based in New York, New York and operates as a subsidiary of ING Groep NV. ING was an underwriter of the 5.625% Notes offering.

54. Defendant Mellon Financial Markets, LLC ("Mellon") is an investment banking and full-service securities dealer firm specializing in public finance, asset-backed finance and institutional sales, servicing hundreds of institutional client. Mellon was an underwriter of the 5.625% Notes offering and the 7% Notes offering.

55. Defendant M.R. Beal & Company ("MR Beal") is a full-service investment banking firm, which includes public finance, corporate debt and equity, fixed-income sales and trading, and financial advisory services. MR Beal was an underwriter of the 5.625% Notes offering.

56. Defendant Natexis Bleichroeder Inc. ("Natexis") provides securities brokerage, equity trading, and research services to individuals, corporations, and institutional investors. Natexis offers corporate finance services, including mergers and acquisitions, divestitures, and investment advice. Natexis is headquartered in New York, New York. Natexis was an underwriter of the 5.625% Notes offering.

57. Defendant SG Americas Securities, LLC ("SG Americas") provides investment banking services. It focuses on capital markets, securities, underwriting, mergers and acquisitions, derivatives, and trading

services. SG Americas is based in New York, New York and operates as a subsidiary of Societe Generale Group. SG Americas was an underwriter of the 5.625% Notes offering.

58. Defendant Wells Fargo Securities, LLC ("Wells Fargo") is an investment services division of Wells Fargo Bank. Wells Fargo provides investment banking services in the United States and offers capital markets access through public offerings, private placements, and debt offerings, which include new issue underwriting of high yield bonds and 144A private placements, as well as market making, research, and equity trading. Wells Fargo also provides advisory services for mergers and acquisitions. Wells Fargo was an underwriter of the 5.625% Notes offering and the 7% Notes offering.

59. Defendant Wachovia Capital Markets, LLC ("Wachovia"), which became part of defendant Wells Fargo in 2009, provides debt and equity underwriting, mergers and acquisitions, loan syndications, debt and equity sales and trading, tax-exempt products, research and economics, and certain hedging products such as equity derivatives. Wachovia was an underwriter of the 6. 75% Notes offering.

60. Defendant Harris Nesbitt Corp. ("Harris Nesbitt") an investment bank, provides investment and corporate banking services in the United States. It offers various financial products and services, including equity and debt underwriting, corporate lending and project financing, merger and acquisitions advisory services, merchant banking, securitization, treasury and market risk management, debt and equity research and institutional sales and trading.

Harris Nesbitt is headquartered in New York, New York. Harris Nesbitt was an underwriter of the 7% Notes offering.

61. Defendant DZ Financial Markets LLC ("DZ Financial") provides securities brokerage and underwriting services and is based in New York, New York. DZ Financial was an underwriter of the 7% Notes offering

62. Defendant Mizuho Securities USA Inc. ("Mizuho") offers underwriting, sales and trading of securities and is a financial derivatives brokerage. Mizuho is based in New York, New York and operates as a subsidiary of Mizuho Securities Co., Ltd. Mizuho was an underwriter of the 7% Notes offering.

63. Defendant Scotia Capital (USA) Inc. ("Scotia") is a wholly owned subsidiary of Scotia Capital Inc., which offers multi-product solutions to clients' financial needs in the United States. Additionally, it offers mergers and acquisitions advisory, private placement, negotiation assistance, due diligence, and restructuring services and provides research, equity sales and trading. Scotia was an underwriter of the 7% Notes offering.

64. Defendant Sovereign Securities Corporation, LLC ("Sovereign") is a security brokerage firm. The firm underwrites municipal debt focusing on short-term instruments such as tax bond, and tax and revenue anticipatory notes. Additionally, Sovereign advises, structures, underwrites, and services the needs of issuers of taxable and tax exempted debt. Sovereign is headquartered in Philadelphia, Pennsylvania and operates as a subsidiary of

Santander Holdings USA, Inc. Sovereign was an underwriter of the 7% Notes offering.

65. Defendant Utendahl Capital Partners, L.P. ("Utendahl") is a boutique investment bank. Utendahl's products and services include underwriting and trading of fixed-income, equity and convertible securities, general corporate finance, structured finance, mergers and acquisitions and asset management. Utendahl was acquired by Williams Capital on or about January 10, 2010. Utendahl was an underwriter of the 7% Notes offering.

66. Defendant Fortis Securities LLC ("Fortis") is an integrated financial services provider engaged in providing business support services. Fortis was an underwriter of the 5.625% Notes offering.

67. Defendant Muriel Siebert & Co., Inc. ("Muriel Siebert") is a stock discount brokerage firm which traded in municipal bonds, government agency bonds, corporate bonds and equities. Muriel Siebert was an underwriter of the 6.75% Notes offering.

68. Defendant Daiwa Securities SMBC Europe Limited ("Daiwa") is an investment banking firm that provides equity, fixed income, investment banking, derivatives, and strategic advisory services. The firm also underwrites and manages new issues, and carries out trading and sales of secondary securities. Daiwa Securities SMBC Europe Limited changed its name to Daiwa Capital Markets Europe Limited in January 2010. Daiwa was an underwriter of the 5.625% Notes offering and the 7% Notes offering.

69. The defendants referenced in ¶¶ 35-68 above are referred to herein as the "Underwriter Defendants."

70. The Underwriter Defendants are liable for the false and misleading statements in the Registration Statement. In connection with the Offerings, the Underwriter Defendants drafted and disseminated the Registration Statement and were paid fees in connection therewith. The Underwriter Defendants' failure to conduct an adequate due diligence investigation was a substantial factor leading to the harm complained of herein.

* * *

COUNT III

For Violation of §11 of the 1933 Act

Against Defendants O'Meara, the Director Defendants and the Underwriter Defendants

191. Plaintiff repeats and realleges the allegations set forth above as if set forth fully herein. For purposes of this Count, plaintiff expressly excludes and disclaims any allegation that could be construed as alleging fraud or intentional or reckless misconduct, as this Count is based solely on claims of strict liability and/or negligence under the 1933 Act.

192. This Count is brought pursuant to §11 of the 1933 Act, 15 U.S.C. §77k, against defendants O'Meara, the Director Defendants and the Underwriter Defendants.

193. The Registration Statement for the Offerings was inaccurate and misleading, contained untrue statements of material facts, omitted to state other facts necessary to make the statements made not misleading, and omitted to state material facts required to be stated therein.

194. The defendants named herein were responsible for the contents and dissemination of the Registration Statement.

195. Each of the Director Defendants and O'Meara signed or authorized the signing of the Registration Statement or was identified in the Offering Documents.

196. The Underwriter Defendants were responsible for the contents and dissemination of the Registration Statement and did not perform adequate due diligence. The Underwriter Defendants were underwriters of certain of the Offerings. The Underwriter Defendants acted negligently and are liable to plaintiff who purchased or otherwise acquired the Lehman Notes sold pursuant or traceable to the Offerings in which each Underwriter Defendant participated.

197. None of the defendants named herein made a reasonable investigation or possessed reasonable grounds for the belief that the statements contained in the Registration Statement were true and without omissions of any material facts and were not misleading.

198. By reason of the conduct herein alleged, each defendant named herein violated, and/or controlled a person who violated, § 11 of the 1933 Act.

199. Plaintiff acquired the Lehman Notes pursuant and/or traceable to the Registration Statement for the Offerings.

200. The defendants named in this Count owed to plaintiff the duty to make a reasonable and diligent investigation of the statements contained in the

Registration Statement, and any incorporated documents, at the time each such Offering became effective to ensure that said statements were true and that they were not misleading. Defendants O'Meara, the Director Defendants and the Underwriter Defendants did not make a reasonable investigation or possess reasonable grounds to believe that the statements contained in the Registration Statement were true, were without omissions of any material facts, and were not misleading. Accordingly, defendants O'Meara, the Director Defendants and the Underwriter Defendants acted negligently and are therefore liable to plaintiff.

201. At the time of its purchases of the Lehman Notes, plaintiff was without knowledge of the facts concerning the wrongful conduct alleged herein and could not have reasonably discovered those facts prior to 2008. Less than one year, as tolled by the pending class action, has elapsed from the time that plaintiff discovered or reasonably could have discovered the facts upon which this Count is based from the time that the initial complaint was filed asserting claims arising out of the Registration Statement. Less than three years, as tolled by the pending class action, has elapsed from the time that the securities upon which this Count is brought were offered in good faith to the public to the time that the initial complaint was filed.

* * *

EXCERPTS FROM JUDGMENT AND ORDER APPROVING SETTLEMENT BETWEEN LEAD CLASS PLAINTIFFS AND THE SETTLING UNDERWRITER DEFENDANTS

This matter came for hearing on April 12, 2012 (the "Settlement Hearing"), on the application of the Settling Parties to determine (i) whether the terms and conditions of the Stipulation of Settlement and Release dated December 2, 2011 (the "First Underwriter Stipulation") between Lead Plaintiffs, on behalf of the UW Settlement Class, and A.G. Edwards & Sons, Inc.; ABN AMRO Inc.; ANZ Securities, Inc.; Banc of America Securities LLC; BBVA Securities Inc.; BNP Paribas; BNY Mellon Capital Markets, LLC; Caja de Ahorros y Monte de Piedad de Madrid; Calyon Securities (USA) Inc. (n/k/a Credit Agricole Corporate and Investment Bank); CIBC World Markets Corp.; Citigroup Global Markets Inc.; Commerzbank Capital Markets Corp.: Daiwa Capital Markets Europe Limited (f/k/a Daiwa Securities SMBC Europe Limited); DnB NOR Markets Inc. (the trade name of which is DnB NOR Markets); DZ Financial Markets LLC; Edward D. Jones & Co., L.P.; Fidelity Capital Markets Services (a division of National Financial Services LLC): Fortis Securities LLC: BMO Capital Markets Corp. (t/k/a Harris Nesbitt Corp.); HSBC Securities (USA) Inc.; ING Financial Markets LLC; Loop Capital Markets, LLC; Mellon Financial Markets, LLC (n/k/a BNY Mellon Capital Markets, LLC); Merrill Lynch, Pierce, Fenner & Smith Inc.; Mizuho Securities USA Inc.; Morgan Stanley & Co. Inc.; nabCapital Securities, LLC (n/k/a nabSecurities, LLC); National Australia Bank Ltd.; Natixis Bleichroeder Inc. (n/k/a Natixis Securities Americas

LLC); Raymond James & Associates, Inc.; RBC Capital Markets, LLC (f/k/a RBC Dain Rauscher Inc.); RBS Greenwich Capital (n/k/a RBS Securities Inc.); Santander Investment Securities Inc.; Scotia Capital (USA) Inc.; SG Americas Securities LLC; Sovereign Securities Corporation LLC; SunTrust Robinson Humphrey, Inc.; TD Securities (USA) LLC: UBS Securities LLC; Utendahl Capital Partners, L.P.; Wachovia Capital Finance; Wachovia Securities, LLC (n/k/a Wells Fargo Securities, LLC); and Wells Fargo Securities, LLC (collectively, the "First Group of Settling Underwriter Defendants") are fair, reasonable, and adequate for the settlement of all Settled Claims, including all claims asserted by Lead Plaintiffs against the Settling Underwriter Defendants in the Third Amended Class Action Complaint for Violations of the Federal Securities Laws (the "Complaint") now pending in this Court in the above-captioned consolidated class action (the "Action"), and should be approved; (ii) whether the terms and conditions of the Stipulation of Settlement and Release dated December 9. 2011 (the "Second Underwriter Stipulation"), largely adopting the First Underwriter Stipulation, between Lead Plaintiffs, on behalf of the UW Settlement Class, and Cabrera Capital Markets LLC; Charles Schwab & Co., Inc.; HVB Capital Markets, Inc.; Incapital LLC; MRB Securities Corp., as general partner of M.R. Beal & Company (M.R. Beal & Company, together with its owners and partners); Muriel Siebert & Co., Inc. and Siebert Capital Markets; and Williams Capital Group L.P. (collectively, the "Second Group of Settling Underwriter Defendants" and, together with the First Group of Settling Underwriter Defendants, the

"Settling Underwriter Defendants") are fair, reasonable, and adequate for the settlement of all Settled Claims, including all claims asserted by Lead Plaintiffs against the Settling Underwriter Defendants in the Complaint now pending in this Court in the Action, and should be approved; and (iii) whether judgment should be entered (a) dismissing the Complaint on the merits, with prejudice and without costs, in favor only of the Settling Underwriter Defendants and the other Released Underwriter Parties and as against all persons or entities who are members of the UW Settlement Class herein who have not requested exclusion therefrom, (b) releasing the Settled Claims as against the Settling Underwriter Defendants and all other Released Underwriter Parties, and (c) entering a Bar Order and judgment reduction provision, as set forth in paragraphs 12 and 13 herein, in connection with this Action. The Court having considered all matters submitted to it at the Settlement Hearing and otherwise; and it appearing that a notice of the Settlement Hearing substantially in the form approved by the Court was mailed to all persons and entities reasonably identifiable as members of the UW Settlement Class, and that a summary notice of the Settlement Hearing substantially in the form approved by the Court was published in the national edition of *The Wall Street Journal* and *Investor's Business Daily* pursuant to the specifications of the Court.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

I. This Judgment hereby incorporates by reference the definitions in the First Underwriter Stipulation and the Second Underwriter Stipulation (together, the

"Stipulations"), and all capitalized terms used herein shall have the same meaning as set forth in the First Underwriter Stipulation for purposes of the settlement with the First Group of Settling Underwriter Defendants and the same meaning as set forth in the Second Underwriter Stipulation for purposes of the settlement with the Second Group of Settling Underwriter Defendants including, but not limited to:

a. "Released Underwriter Parties" shall mean any and all of the Settling Underwriter Defendants and their respective current and former trustees, officers, directors, principals, predecessors, successors, assigns, attorneys, parents, affiliates, employers, employees, agents, and subsidiaries, but specifically does not include any Non-Settling Defendant.

b. "Released Underwriter Parties' Claims" shall mean any and all claims and causes of action of every nature and description, whether known claims or Unknown Claims, whether arising under federal, state, common or foreign law, that arise out of or relate in any way to the institution, prosecution, or settlement of the claims against the Settling Underwriter Defendants, except for claims relating to the enforcement of the Settlement.

c. "Settled Claims" shall mean any and all claims, rights, demands, liabilities and causes of action of every nature and description, to the fullest extent that the law permits their release in this Action, whether known claims or Unknown Claims, whether arising under federal, state, common or foreign law, whether class or individual in nature, that Lead Plaintiffs or any other members of the Settlement Class: (a) alleged in the Complaint, or (b) could have asserted in any

forum that arise out of or are based upon or are related to the allegations, transactions, facts, matters or occurrences, representations or omissions involved, set forth, or referred to in the Complaint and that arise out of the Settlement Class Member's purchase or acquisition of the Lehman Securities pursuant or traceable to the Shelf Registration Statement and Offering Materials incorporated by reference in the Shelf Registration Statement. Notwithstanding the foregoing, the Settlement Class, through the release in this Settlement, will not release (i) any claims against the Non-Settling Defendants; (ii) the claims asserted in any ERISA action or mortgage-backed securities action, including such claims submitted against any of the debtors in the Lehman Bankruptcy Proceedings or the LBI SIPA Proceeding; (iii) any claims or interests in the Lehman Bankruptcy Proceeding or the LBI SIPA Proceeding asserted by an individual Settlement Class Member based solely upon the ownership of any Lehman security which is entitled to a distribution under any confirmed plan of reorganization in the Lehman Bankruptcy Proceeding because of such ownership; or (iv) claims relating to the enforcement of the Settlement.

2. This Court has jurisdiction to enter this Judgment. The Court has jurisdiction over the subject matter of the Action and over all parties to the Action, including all UW Settlement Class Members.

3. The Court hereby affirms its findings in its Order Concerning Proposed Settlement with the Settling Underwriter Defendants dated December 15, 2011 (the "Preliminary Order"), that for purposes of the UW Settlement only, the prerequisites for a class action under Rules 23(a) and (b)(3) of the Federal

Rules of Civil Procedure have been satisfied in that: (a) the number of UW Settlement Class Members is so numerous that joinder thereof is impracticable; (b) there are questions of law and fact common to the UW Settlement Class; (c) the claims of the UW Settlement Class Representatives are typical of the claims of the UW Settlement Class; (d) the UW Settlement Class Representatives and Lead Counsel have and will fairly and adequately represent the interests of the UW Settlement Class; (e) the questions of law and fact common to the members of the UW Settlement Class predominate over any questions affecting only individual members of the UW Settlement Class; and (f) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

4. The Court further affirms its determinations in the Preliminary Order and finally certifies, for purposes of the UW Settlement only, pursuant to Rule 23(a) and Rule 23(b)(3) of the Federal Rules of Civil Procedure, the Action to proceed as a class action on behalf of all persons or entities who purchased or otherwise acquired Lehman securities identified in Appendix A to the First Underwriter Stipulation ("Lehman Securities") pursuant or traceable to the Shelf Registration Statement and Offering Materials incorporated by reference in the Shelf Registration Statement and who were damaged thereby. The UW Settlement Class includes registered mutual funds, managed accounts, or entities with nonproprietary assets managed by any of the Released Underwriter Parties including, but not limited to, the entities listed on Exhibit C attached to the First Underwriter Stipulation, who purchased or otherwise acquired

Lehman Securities (each, a "Managed Entity"). Excluded from the UW Settlement Class are (i) Defendants, (ii) the officers and directors of each Defendant, (iii) any entity (other than a Managed Entity) in which a Defendant owns, or during the period July 19, 2007 to September 15, 2008 (the "Underwriter Settlement Class Period") owned, a majority interest, (iv) members of Defendants' immediate families and the legal representatives, heirs, successors or assigns of any such excluded party, and (v) Lehman. Also excluded from the UW Settlement Class are the persons and entities who timely and validly requested exclusion from the UW Settlement Class as listed on Exhibit 1 annexed hereto.

5. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, for purposes of the UW Settlement only, this Court affirms its findings in the Preliminary Order that the UW Settlement Class Representatives arc adequate class representatives and finally certifies them as UW Settlement Class Representatives, and finally certifies the law firms of Bernstein Litowitz Berger & Grossmann LLP and Kessler Topaz Meltzer & Check, LLP as Class Counsel pursuant to Rule 23(g) of the Federal Rules of Civil Procedure.

6. Notice of the pendency of this Action as a class action and of the proposed UW Settlement was given to all UW Settlement Class Members who could be identified with reasonable effort. The form and method of notifying the UW Settlement Class of the pendency of the Action as a class action and of the terms and conditions of the proposed UW Settlement met the requirements of due process, Rule 23 of the Federal Rules of Civil Procedure, Section 27 of the Securities

Act of 1933, 15 U.S.C. §77z-1 (a)(7), as amended by the Private Securities Litigation Reform Act of 1995, and constituted the best notice practicable under the circumstances, and constituted due and sufficient notice to all persons and entities entitled thereto.

7. Pursuant to and in compliance with Rule 23 of the Federal Rules of Civil Procedure, the Court hereby finds that due and adequate notice of these proceedings was directed to all persons and entities who are UW Settlement Class Members, advising them of the UW Settlement, of Lead Counsel's intent to apply for attorneys' fees and reimbursement of Litigation Expenses associated with the Action, and of their right to object thereto, and a full and fair opportunity was accorded to all persons and entities who are UW Settlement Class Members to be heard with respect to the foregoing matters. Thus, it is hereby determined that all UW Settlement Class Members who did not timely and validly elect to exclude themselves by written communication received by the claims administrator no later than the date set forth in the Notice and the Preliminary Order, are bound by this Judgment.

* * *

18. Without further Order of the Court, the parties may agree to reasonable extensions of time to carry out any of the provisions of the Stipulations.

19. There is no just reason for delay in the entry of this Judgment and immediate entry by the Clerk of the Court is expressly directed.

Dated: April 25, 2012

/s/ Lewis A. Kaplan

The Honorable Lewis A. Kaplan

United States District Judge

Exhibit 1

Persons and Entities Excluded from the UW Settlement Class

* * *

3. California Public Employees' Retirement System c/o Robbins Geller Rudman & Dowd LLP

San Diego, CA

* * *

EXCERPTS FROM NOTICE OF PENDENCY OF CLASS ACTION AND PROPOSED SETTLEMENT WITH THE SETTLING UNDERWRITER DEFENDANTS, SETTLEMENT FAIRNESS HEARING AND MOTION FOR ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES

If You Purchased or Acquired the Lehman Securities Described Below, You Could Get Payments from Legal Settlements with Certain Defendants.

A U.S. Federal Court authorized this Notice. This is not a solicitation from a lawyer.

- Multiple settlements have been reached in the class action lawsuit *In re Lehman Brothers Equity/Debt Securities Litigation*, No. 08-CV-5523-LAK (S.D.N.Y.) (the "Action"). This notice addresses the settlements reached with all but one of the underwriters named as defendants in the Action (the "Underwriter Settlement").[1] The initial settlement was reached with the first group of settling Underwriter Defendants in the amount of $417,000,000 pursuant to a Stipulation of Settlement and Release executed on December 2, 2011 (the "First Underwriter Stipulation"). The second settlement was reached with the second

[1] The $90 million settlement reached with the director and officer defendants (the "D&O Settlement") is addressed briefly below in Question 6.

group of settling Underwriter Defendants[2] for additional monetary recoveries in the aggregate amount of $9,218,000 pursuant to a Stipulation of Settlement and Release executed on December 9, 2011 (the "Second Underwriter Stipulation" and together with the First Underwriter Stipulation, the "Stipulations"). The Second Underwriter Stipulation largely adopts the terms of the First Underwriter Stipulation. This notice is directed at all persons and entities who purchased or otherwise acquired Lehman securities identified in Appendix A hereto (the "Lehman Securities") pursuant or traceable to the Shelf Registration Statement and Offering Materials incorporated by reference in the Shelf Registration Statement and were damaged thereby (the "Underwriter Class").[3]

- The Underwriter Settlement is comprised of $426,218,000 in cash (the "Underwriter Settlement Amount") plus any interest or income earned thereon (the "Underwriter Settlement Fund") for the benefit of the Underwriter Class. Estimates of average recovery per damaged security are set

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[2] The first group of settling Underwriter Defendants and the second group of settling Underwriter Defendants shall be jointly referred to as the "Settling Underwriter Defendants," as defined in Part 1 of the Section entitled "Basic Information," below.

[3] The Shelf Registration Statement refers to the shelf registration statement filed by Lehman Brothers Holdings Inc. ("LBHI") with the U.S. Securities and Exchange Commission ("SEC") on Form S-3 and dated May 30, 2006, together with any amendments thereto, as well as any materials incorporated by reference therein. The Offering Materials refer to the materials incorporated by reference in the Shelf Registration Statement.

forth on Appendix C hereto. Underwriter Class Members should note, however, that these are only estimates based on the overall number of potentially damaged securities in the Underwriter Class. Some Underwriter Class Members may recover more or less than these estimated amounts depending on, among other factors, how many Underwriter Class Members submit claims, when and the prices at which their Lehman Securities were purchased, acquired or sold, and what security they purchased, acquired or sold. In addition, as set forth in Question 19 below, Lead Counsel (as defined below) will seek approval for attorneys' fees in an amount not to exceed 17.5% of the Underwriter Settlement Amount, plus interest thereon, and for reimbursement of costs incurred by Lead Counsel and other counsel to Named Plaintiffs (as defined below) in connection with commencing and prosecuting the Action and the costs and expenses of the Lead Plaintiffs (as defined below) (collectively, the "Litigation Expenses") in an amount not to exceed $2.5 million, plus interest thereon. The total amount of Litigation Expenses awarded by the Court will be paid to Lead Counsel from the D&O Settlement and the Underwriter Settlement in *pro rata* amounts. If the Court approves Lead Counsel's application for attorneys' fees and Litigation Expenses (as set forth in Question 19 below), the estimated average cost per damaged security will be as set forth on Appendix C hereto.

- If the Underwriter Settlement is approved by the Court, it will result in (i) the distribution of the Underwriter Settlement Fund, minus certain

Court-approved fees, costs and expenses as described herein, to investors who submit valid claim forms; (ii) the release of the Settling Underwriter Defendants (as defined below) and certain other related parties, as identified in Question 1 below, from further lawsuits that are based on, arise out of, or relate in any way to the facts and claims alleged, or that could have been alleged, in the Action; and (iii) the dismissal with prejudice of the claims against the Settling Underwriter Defendants. The Underwriter Settlement also avoids the costs and risks of further litigation against these defendants.

- The Underwriter Settlement does not resolve claims against any other defendant in the Action, and the Action will continue against Ernst & Young, LLP ("E&Y"), Lehman Brothers Holdings Inc.'s outside auditor during the relevant time period, and the remaining, non-settling underwriter defendant, UBS Financial Services, Inc. (the "Non-Settling Defendants"). Please Note: The Underwriter Settlement is separate and apart from the D&O Settlement, the proposed $90 million settlement Lead Plaintiffs reached with certain of Lehman's officers and directors during the relevant time period. You should have received a notice for the D&O Settlement along with this Notice. *See* Question 6 below for more details. You are not automatically in both settlements as they cover different securities in some instances, so you should read both notices to determine if you are eligible to participate in each settlement.

* * *

12. What am I giving up as part of the Underwriter Settlement?

If the Underwriter Settlement is approved by the Court and becomes final, you will be releasing the Settling Underwriter Defendants (as set forth in Question 1 above) and the Released Underwriter Parties (as set forth in Question 1 above) for all of the Settled Claims defined in paragraph 1(ii) of the First Underwriter Stipulation and paragraph 1(ii) of Exhibit A to the Second Underwriter Stipulation. These claims are called "Settled Claims" and are those brought in this case or that could have been raised in the case, as fully defined in the First Underwriter Stipulation and Second Underwriter Stipulation. Copies of the Stipulations are available at www.LehmanSecuritiesLitigationSettlement.com. The First Underwriter Stipulation describes the Settled Claims with specific description, in necessarily accurate legal terminology, so please read it carefully.

The Settling Parties will also seek, among other things, a judgment reduction order in connection with the Judgment in the Action. A judgment reduction order generally reduces the liability of non-settling defendants and/or certain other parties for common damages by the greater of the settlement amount paid by or on behalf of the settling defendants for common damages or the percentage share of responsibility of the settling defendants for common damages.[5]

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[5] The Settling Parties will also seek to include in the Judgment a "bar order" that will, among other things, bar certain claims for contribution and indemnification against or by the

* * *

Excluding Yourself From the Underwriter Settlement

If you do not want a payment from the Underwriter Settlement, but you want to keep the right to sue or continue to sue the Settling Underwriter Defendants on your own about the same claims being released in the Underwriter Settlement, then you must take steps to exclude yourself from the settlement. This is sometimes referred to as "opting out" of the Underwriter Class. *See* Question 17 below.

15. If I exclude myself, can I get money from the Underwriter Settlement?

No. If you exclude yourself from the Underwriter Class, you will not be able to request a payment from the Underwriter Settlement, and you cannot object to the Underwriter Settlement. You will not be bound by anything that happens in this lawsuit with respect to the Settling Underwriter Defendants, and you may be able to sue the Settling Underwriter Defendants on your own in the future. Excluding yourself from the Underwriter Class will not automatically exclude you from any other, or subsequent, settlement class relating to any future settlement with other defendants. Accordingly, excluding yourself from the Underwriter Class will not automatically exclude you from the settlement class in the D&O Settlement referenced above. A request for exclusion should specifically indicate that you wish to be excluded from

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Settling Underwriter Defendants and/or certain other related parties. The bar order typically does not apply to class members.

the Underwriter Class, the D&O Settlement Class, or both. In the event that you do not specify which settlement class you seek to be excluded from, your request will be interpreted as seeking to be excluded from both the Underwriter Class and the settlement class in the D&O Settlement.

16. If I do not exclude myself, can I sue later?

No. Unless you exclude yourself, you give up any right to sue the Settling Underwriter Defendants or any of the other released parties for the claims being released by the Underwriter Settlement. If you have a pending lawsuit relating to the claims being released in the Action against any of the Settling Underwriter Defendants, you should speak to your lawyer in that case immediately.

17. How do I get out of the Underwriter Settlement?

To exclude yourself from the Underwriter Class, you must send a letter by mail saying that you want to be excluded from the Underwriter Class in the *In re Lehman Brothers Equity/Debt Securities Litigation – Settling Underwriter Defendants Settlement*, Case No. 08-CV-5523 (LAK). Be sure to include your name, address and telephone number. You must also include information concerning your transactions in Lehman Securities, including the date(s), price(s), type(s) and amount(s) of all purchases, acquisitions, and sales of Lehman Securities. The request for exclusion must be signed by the person or entity requesting exclusion. Requests for exclusion will not be valid if they do not include the information set forth above. You must mail your exclusion request so that it is **received** no later than **March 22, 2012** to:

In Re: Lehman Brothers Equity / Debt Securities Litigation

c/o GCG

Claims Administrator

P.O. Box 9821

Dublin, OH 43017-5721

*Please keep a copy of everything you send by mail, in case it is lost or destroyed during mailing.

You cannot exclude yourself over the phone or by e-mail.

Pursuant to the terms of separate supplemental agreements between Lead Plaintiffs and the two groups of Settling Underwriter Defendants, each group of Settling Underwriter Defendants shall have the option to terminate their settlement in the event that members of the Underwriter Class, who purchased and/or acquired a certain amount of Lehman Securities and would otherwise be entitled to participate in the Underwriter Class, timely and validly request exclusion in accordance with the requirements set forth in this Notice.

The Lawyers Representing You

18. Do I have a lawyer in this case?

The Court has appointed the law firms of Bernstein Litowitz Berger & Grossmann LLP and Kessler Topaz Meltzer & Check, LLP to represent you and the other Underwriter Class Members. These lawyers are called Lead Counsel. You may contact them as follows: David R. Stickney, Esq., Bernstein Litowitz Berger & Grossmann LLP, 12481 High Bluff Drive, Suite 300, San Diego, CA 92130 (866) 648-2524,

blbg@blbglaw.com, or David Kessler, Kessler Topaz Meltzer & Check, LLP, 280 King of Prussia Road, Radnor, PA 19087, (610) 667-7706, info@ktmc.com. You will not be separately charged for these lawyers beyond your *pro rata* share of any attorneys' fees and expenses awarded by the Court that will be paid from the Underwriter Settlement Fund. If you want to be represented by your own lawyer, you may hire one at your own expense.

19. How will the lawyers be paid?

Lead Counsel have not received any payment for their services in pursuing claims against the Settling Underwriter Defendants on behalf of the Underwriter Class, nor have they been reimbursed for their out-of-pocket expenses. Before final approval of the Underwriter Settlement, Lead Counsel intend to apply to the Court for an award of attorneys' fees, as compensation for investigating the facts, litigating the case and negotiating the settlement, on behalf of all Plaintiffs' Counsel not to exceed 17.5% of the Underwriter Settlement Amount, plus interest thereon. At the same time, Lead Counsel also intend to apply for reimbursement of Litigation Expenses in an amount not to exceed $2.5 million, plus interest thereon. The total amount of Litigation Expenses awarded by the Court will be paid to Lead Counsel from the D&O Settlement and the Underwriter Settlement in *pro rata* amounts. Litigation Expenses may include reimbursement of the expenses of Lead Plaintiffs in accordance with 15 U.S.C. § 77z-1(a)(4). The Court may award less than the requested amounts. Any payments to the attorneys for fees or expenses, now or in the future, will first be approved by the Court.

Objecting to the Underwriter Settlement

You can tell the Court that you do not agree with the Underwriter Settlement or some part of it.

20. How do I tell the Court if I do not like the Underwriter Settlement?

If you are an Underwriter Class Member, you can object to the Underwriter Settlement if you do not like any part of it. To object, you must send a letter to each of the below addressees saying that you object to the Underwriter Settlement in the *In re Lehman Brothers Equity/Debt Securities Litigation – Settling Underwriter Defendants Settlement*, Case No.08-CV-5523 (LAK) and the reasons why you object to the Underwriter Settlement. Be sure to include your name, address, telephone number and your signature. You must also include information concerning all of your transactions in Lehman Securities, including the date(s), price(s), type(s) and amount(s) of all purchases, acquisitions, and sales of the eligible Lehman Securities to confirm that you are a member of the Underwriter Class, including brokerage confirmation receipts or other competent documentary evidence of such transactions. The objection must include a written statement of all grounds for an objection accompanied by any legal support for the objection; copies of any papers, briefs or other documents upon which the objection is based; a list of all persons who will be called to testify in support of the objection; a statement of whether the objector intends to appear at the fairness hearing (*see* Questions 22-24 below); a list of other cases in which the objector or the objector's counsel have appeared either as settlement objectors or as counsel for

objectors in the preceding five years; and the objector's signature, even if represented by counsel. If you are not a member of the Underwriter Class, you cannot object to the settlement as it does not affect you. Any objection to the Underwriter Settlement must be **received** by *each of the following* by **March 22, 2012**:

Clerk of the Court	**Lead Counsel**	**Representative Counsel for the Settling Underwriter Defendants**
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK Clerk of the Court 500 Pearl Street New York, NY 10007	BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP David Stickney 12481 High Bluff Drive, Suite 300 San Diego, CA 92130-3582 KESSLER TOPAZ MELTZER & CHECK, LLP David Kessler John Kehoe 280 King of Prussia Road	***For the First Group of Settling Underwriter Defendants:*** CLEARY GOTTLIEB STEEN & HAMILTON LLP Mitchell Lowenthal Victor L. Hou Roger Cooper One Liberty Plaza New York, NY 10006 ***For the Second Group of***

	Radnor, PA 19087	***Settling Underwriter Defendants:*** HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN PC Kenneth G. Hausman Three Embarcadero Center Seventh Floor San Francisco, CA 94111-4024

Unless the Court orders otherwise, any Underwriter Class Member who does not object in the manner described above will be deemed to have waived any objection and shall be forever foreclosed from making any objection to the proposed Underwriter Settlement, the proposed Plan of Allocation, or Lead Counsel's request for an award of attorneys' fees and reimbursement of Litigation Expenses. Underwriter Class Members do not need to appear at the fairness hearing (*see* Questions 22-24 below) or take any other action to indicate their approval.

21. What's the difference between objecting and excluding?

Objecting is simply telling the Court that you do not like something about the Underwriter Settlement, the Plan of Allocation, and/or the application for attorneys' fees and Litigation Expenses. You can object ***only if*** you stay in the Underwriter Class. Excluding yourself is telling the Court that you do not want to be part of the Underwriter Settlement. If you exclude yourself, you have no basis to object because the case no longer affects you.

The Court's Fairness Hearing

The Court will hold a hearing to consider whether to approve the Underwriter Settlement, the Plan of Allocation and the application for attorneys' fees and Litigation Expenses. You may attend and you may ask to speak, but you do not have to.

22. When and where will the Court decide whether to approve the Underwriter Settlement?

The Court will hold a fairness hearing at 4:00 p.m., on April 12, 2012, before the Honorable Lewis A. Kaplan at the United States District Court for the Southern District of New York, Daniel Patrick Moynihan United States Courthouse, 500 Pearl St, New York, NY 10007, Courtroom 12D. At this hearing, the Court will consider whether the Underwriter Settlement and the Plan of Allocation are fair, reasonable, and adequate. If there are objections, the Court will consider them. Judge Kaplan will listen to people who have asked to speak at the hearing. Judge Kaplan may also consider Lead Counsel's application for attorneys' fees and Litigation Expenses at this

time. The fairness hearing may occur on a different date without additional notice, so it is a good idea to check www.LehmanSecuritiesLitigationSettlement.com for updated information.

23. Do I have to come to the fairness hearing?

No. Lead Counsel will answer any questions Judge Kaplan may have. But, you are welcome to attend the hearing at your own expense. If you send an objection, you do not have to come to Court to talk about it. As long as your written objection was received on time, the Court will consider it. You may also pay your own lawyer to attend, but it is not required.

24. May I speak at the fairness hearing?

You may ask the Court for permission to speak at the fairness hearing. To do so, you must send a letter stating that it is your "Notice of Intention to Appear in the *In re Lehman Brothers Equity/Debt Securities Litigation*, Case No. 08-MD-CV- 5523 (LAK)." Be sure to include your name, address, telephone number, your signature, and also identify your transactions in Lehman Securities, including the date(s), price(s), type(s) and amount(s) of all purchases, acquisitions, and sales of the eligible Lehman Securities. Your notice of intention to appear must be received no later than March 22, 2012, and must be sent to the Clerk of the Court, Lead Counsel, and Representative Counsel for the Settling Underwriter Defendants, at the addresses listed in Question 20 above. You cannot speak at the hearing if you exclude yourself from the Underwriter Class.

If You Do Nothing

25. What happens if I do nothing at all?

If you do nothing, you will receive no money from this Underwriter Settlement. But, unless you exclude yourself, you will not be able to start a lawsuit, continue with a lawsuit, or be part of any other lawsuit against the Settling Underwriter Defendants or other released parties about the same claims being released in the Underwriter Settlement. You will be able to act on any rights you have against the Non-Settling Defendants.

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FEB 27 2017
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SUPREME COURT, U.S.

No. 16-373

IN THE

Supreme Court of the United States

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM,

Petitioner,

v.

ANZ SECURITIES, INC., ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF FOR THE PETITIONER

Darren J. Robbins
Joseph D. Daley
Thomas E. Egler
ROBBINS GELLER
RUDMAN & DOWD LLP
655 West Broadway
Suite 1900
San Diego, CA 92101

Thomas C. Goldstein
Counsel of Record
Tejinder Singh
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
tg@goldsteinrussell.com

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Does the timely filing of a valid class action satisfy or toll the three-year filing period set by Section 13 of the Securities Act of 1933 with respect to subsequent opt-out suits by individual class members?

PARTIES TO THE PROCEEDING BELOW

Petitioner California Public Employees' Retirement System was the appellant below.

The appellees below, who are respondents in this action, are:

1. ANZ Securities, Inc.
2. Bankia, S.A. (as successor to Caja de Ahorros y Monte de Piedad de Madrid)
3. BBVA Securities Inc.
4. BMO Capital Markets Corp. (f/k/a Harris Nesbitt Corp.)
5. BNP Paribas FS, LLC (f/k/a Fortis Securities LLC)
6. BNP Paribas S.A.
7. BNY Mellon Capital Markets, LLC (f/k/a BNY Capital Markets, Inc. and as successor to Mellon Financial Markets LLC)
8. CIBC World Markets Corp.
9. Citigroup Global Markets Inc.
10. Daiwa Capital Markets Europe Limited (f/k/a Daiwa Securities SMBC Europe Limited)
11. DZ Financial Markets LLC
12. HSBC Securities (USA) Inc.
13. HVB Capital Markets, Inc.
14. ING Financial Markets LLC
15. Mizuho Securities USA Inc.
16. M.R. Beal & Company
17. Muriel Siebert & Co. Inc.
18. nabSecurities LLC (f/k/a National Australia Capital Markets, LLC)
19. Natixis Securities Americas LLC (f/k/a Natixis Bleichroeder Inc.)
20. RBC Capital Markets LLC (f/k/a RBC Capital Markets Corp.)

21. RBS Securities, Inc. (f/k/a Greenwich Capital Markets, Inc.)
22. RBS WCS Holding Company (as successor to ABN AMRO Inc.)
23. Santander Investment Securities Inc.
24. Scotia Capital (USA) Inc.
25. SG Americas Securities, LLC
26. Sovereign Securities Corporation LLC
27. SunTrust Capital Markets, Inc.
28. Utendahi Capital Partners, L.P.
29. Wells Fargo Securities, LLC (on its own behalf and as successor to Wachovia Capital Markets, LLC)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, petitioner discloses that it has no parent corporation and no stock, and so no publicly traded company owns 10% or more of its stock.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING BELOW ii

CORPORATE DISCI OSURE STATEMENT iii

TABLE OF AUTHORITIES vi

BRIEF FOR THE PETITIONER 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

I. Legal Background. 2

II. Factual Background 3

SUMMARY OF ARGUMENT 8

ARGUMENT 14

I. *American Pipe* And Its Progeny Establish That CalPERS's Action Was Timely. 15

A. *American Pipe* Is An Established Feature Of Federal Civil Procedure. 15

B. The Second Circuit's Decision Undermines The Interests This Court Sought To Protect In *American Pipe* And Its Progeny 22

C. *American Pipe* Upholds The Due Process Right To Opt Out Of Class Litigation. 25

II. CalPERS's Action Was Timely Regardless Of Tolling.....30

A. The Text And Purpose Of Section 13, As Well As *American Pipe*'s Explanation Of When An Action Is Brought, Establish That CalPERS's Action Was Timely Without Regard To Tolling. 31

B. Respondents' Contrary Position Is Untenable. 35

III. The Rule Of *American Pipe* Tolls The Three-Year Limitations Period In Section 13 Of The Securities Act. 38

A. *American Pipe* Tolling Applies Equally To Statutes Of Limitations And Statutes Of Repose. 39

B. In Any Event, Section 13 Is A Statute Of Limitations And On That Basis Is Subject To *American Pipe* Tolling. 43

C. Neither This Court's Decision In *Lampf* Nor The Rules Enabling Act Suggests That *American Pipe* Tolling Does Not Apply To The Three-Year Period In Section 13. 46

CONCLUSION 51

TABLE OF AUTHORITIES

Cases

Alexander v. Sandoval,
532 U.S. 275 (2001) 36

American Pipe & Constr. Co. v. Utah,
414 U.S. 538 (1974) ..... passim

Beach v. Ocwen Fed. Bank,
523 U.S. 410 (1998) 50

Chardon v. Fumero Soto,
462 U.S. 650 (1983) 19

Credit Suisse Sec. (USA) LLC v. Simmonds,
566 U.S. 221 (2012) 20, 47

Crown, Cork & Seal Co. v. Parker,
462 U.S. 345 (1983) ..... passim

CTS Corp. v. Waldburger,
134 S. Ct. 2175 (2014) 40, 44

Devlin v. Scardelletti,
536 U.S. 1 (2002) 17, 20

Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (1974) 19, 27

Erica P. John Fund, Inc. v. Halliburton Co.,
No. 15-90038, 2015 WL 10714013 (5th Cir. Nov. 4, 2015) 27

Ernst & Ernst v. Hochfelder,
425 U.S. 185 (1976) 2, 44

Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.,
554 U.S. 33 (2008) 44

Gelboim v. Bank of Am. Corp.,
135 S. Ct. 897 (2015) 22

Halliburton Co. v. Erica P. John Fund, Inc.,
134 S. Ct. 2398 (2014) 22, 27

Heimeshoff v. Hartford Life & Accident Ins. Co.,
134 S. Ct. 604 (2013) 50

Herman & MacLean v. Huddleston, 459 U.S.
375 (1983) 27

In re BP p.l.c. Sec. Litig.,
No. 4:13-CV-1393, 2014 WL 4923749 (S.D.
Tex. Sept. 30, 2014) 30

In re: Petrobras Sec. Litig.,
312 F.R.D. 354 (S.D.N.Y. 2016) 24

Irwin v. Dep't of Veterans Affairs,
498 U.S. 89 (1990) 48

Jones v. Bock,
549 U.S. 199 (2007) 35

Joseph v. Wiles,
223 F.3d 1155 (10th Cir. 2000) 30

Kimble v. Marvel Entm't, LLC,
135 S. Ct. 2401 (2015) 21

Merck & Co. v. Reynolds,
559 U.S. 633 (2010) 45

*Merrill Lynch, Pierce, Fenner & Smith Inc. v.
Manning*,
136 S. Ct. 1562 (2016) 31

*Omnicare, Inc. v. Laborers Dist. Council Constr.
Indus. Pension Fund*,
135 S. Ct. 1318 (2015) 2, 42

Ortiz v. Fibreboard Corp.,
527 U.S. 815 (1999) 25, 29

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) 25

Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc.,
721 F.3d 95 (2d Cir. 2013), *cert. granted sub nom. Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, 134 S. Ct. 1515 (2014), *cert. dismissed as improvidently granted*, 135 S. Ct. 42 (2014) ..... passim

SEC v. Zandford,
535 U.S. 813 (2002) 34

Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.,
559 U.S. 393 (2010) 49

Smith v. Bayer Corp.,
564 U.S. 299 (2011) 20

Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.,
135 S. Ct. 2507 (2015) 36

United Airlines, Inc. v. McDonald,
432 U.S. 385 (1977) 19, 20

Wallace v. Kato,
549 U.S. 384 (2007) 45

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011) 25

Young v. United States,
535 U.S. 43 (2002) 48, 50

Statutes

15 U.S.C. § 77k 2, 36, 42

15 U.S.C. § 77m ..... passim

15 U.S.C. § 78t-1 36

15 U.S.C. § 78u-4 24

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1658(b) 36

28 U.S.C. § 2072(b) 13, 49

Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 21

Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 21

Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 21

Rules

Fed. R. Civ. P. 23(b)(3) 5, 10, 48

Fed. R. Civ. P. 23(c) 48

Other Authorities

78 Cong. Rec. 8198 (1934) 45, 46

Ballentine's Law Dictionary (2d ed. 1930) 44

Black's Law Dictionary (3d ed. 1933) 44

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BRIEF FOR THE PETITIONER

Petitioner California Public Employees' Retirement System ("CalPERS") respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Second Circuit's opinion (Pet. App. 1a-6a) is unpublished but available at 2016 WL 3648259. The relevant opinions of the district court (Pet. App. 7a-13a) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 2016. Pet. App. 1a. A timely petition for a writ of certiorari was filed on September 22, 2016. The petition was granted on January 13, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 77m of Title 15 of the U.S. Code provides in relevant part:

> **Limitation of actions**
>
> No action shall be maintained to enforce any liability created under [Section 11 of the Securities Act of 1933] unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence . . . . In no event shall any such action be brought to enforce a liability created under [Section 11] . . . more than three years after the security was bona fide offered to the public . . . .

STATEMENT OF THE CASE

I. Legal Background.

"The Securities Act of 1933 protects investors by ensuring that companies issuing securities (known as 'issuers') make a full and fair disclosure of information relevant to a public offering. The linchpin of the Act is its registration requirement." *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1323 (2015) (quotation marks and citations omitted). With very limited exceptions, every issuer must file with the SEC and publish a registration statement before offering securities to the public. *See id.*

Section 11 of the Securities Act ensures that issuers "tell[] the whole truth" to investors in registration statements. *Id.* at 1331 (quotation marks and citation omitted). If a registration statement "contain[s] an untrue statement of a material fact or omit[s] to state a material fact required to be stated therein or necessary to make the statements therein not misleading," any person who acquires the security can bring an action against certain persons involved in the statement's preparation and dissemination. 15 U.S.C. § 77k(a).

Claims under Section 11 are subject to the "procedural restrictions" in Section 13, which sets forth "a statute of limitations of one year from the time the violation was or should have been discovered, in no event to exceed three years from the time of offer or sale." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 208-10 (1976). Section 13, titled "Limitation of actions," provides:

> No action shall be maintained to enforce any liability created under [Section 11] . . . unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence . . . . In no event shall any such action be brought to enforce a liability created under [Section 11] . . . more than three years after the security was bona fide offered to the public . . . .

15 U.S.C. § 77m.

II. Factual Background.

At the turn of the century, Lehman Brothers was the fourth-largest investment bank in the United States. Between July 2007 and January 2008, Lehman raised over $31 billion from investors through debt offerings. Petitioner CalPERS, the nation's largest pension fund, purchased millions of dollars of those securities. But unbeknownst to CalPERS and other investors, Lehman was a colossus with feet of clay: the bank had invested heavily in subprime mortgage loans, while concealing its exposure thereto and using accounting gimmicks to mask its shaky financial condition. When the truth about Lehman's financial condition was revealed, the company collapsed.

Shortly before Lehman declared bankruptcy in 2008, a retirement fund filed a putative class action (the "Class Action") in the Southern District of New York. (Relevant excerpts of the operative complaint (the "Class Action Complaint") are reproduced at J.A. 50-66.) The Class Action Complaint asserted claims with respect to thirty different debt offerings. J.A. 58-66.

Among other claims, the Class Action Complaint stated a claim under Section 11 against respondents, who were involved in underwriting Lehman's debt offerings, alleging that the registration statements contained untrue statements and omitted material facts concerning Lehman's accounting practices. J.A. 51-54.

The Class Action Complaint was filed on behalf of a class of investors including "all persons and entities, except Defendants and their affiliates, who purchased or otherwise acquired the Lehman Brothers Holdings Inc. . . . securities identified" in appendices attached to the Class Action Complaint. J.A. 50. There is no dispute that the Class Action Complaint satisfied the requirements of Rule 23 of the Federal Rules of Civil Procedure. Nor is there any dispute that petitioner CalPERS was from the outset a member of the class defined by the Class Action Complaint.

For years, the Class Action did not materially advance. In February 2011, CalPERS elected to take charge of litigating the claims brought on its behalf in the Class Action by litigating those same claims in its own suit against respondents in the Northern District of California. Complaint, *Cal. Pub. Emps.' Ret. Sys. v. Fuld*, No. 3:11-cv-00562-EDL (N.D. Cal. Feb. 7, 2011). (Relevant excerpts of "CalPERS's Complaint" are reproduced at J.A. 67-79.)

Each of CalPERS's claims embodies a claim previously set forth on behalf of it and other investors in the Class Action Complaint. As relevant here, CalPERS alleged that respondents had violated Section 11 with respect to six debt offerings—of the thirty specified by the Class Action Complaint—that

CalPERS had itself purchased. *Compare* J.A. 67 (listing the offerings CalPERS had purchased) *with* J.A. 58, 60, 61, 65 (each of those offerings also listed in the Class Action Complaint Appendix). Thus, CalPERS's Section 11 claims constituted a subset of the pending class claims. CalPERS's theory of liability was the same as the Class Action Complaint, the predicate facts were the same, and respondents were named as defendants in the Class Action Complaint. *Compare* J.A. 51-54 *with* J.A. 77-79 (both asserting Section 11 causes of action based on the same registration statements).

The litigation over CalPERS's Complaint was subsequently transferred to the Southern District of New York and consolidated with the Class Action for pretrial purposes by order of the U.S. Judicial Panel on Multidistrict Litigation. *See* J.A. 8.

Later that year, class counsel and the defendants reached a proposed settlement of the claims in the Class Action Complaint. At their request, the district court preliminarily certified a class for settlement purposes under Fed. R. Civ. P. 23(b)(3).

The court issued a notice of the settlement to the class. *See* J.A. 89-103 (excerpts from the notice). As required under Rule 23 and principles of due process (*see infra* at 25-30), the notice granted each class member, including CalPERS, the right to opt out of the settlement and pursue those same claims on its own.

J.A. 94-96. There is no dispute that CalPERS timely opted out in the form required by the opt-out notice.[1]

The district court nonetheless subsequently granted respondents' motion to dismiss CalPERS's Section 11 claims relating to five of the six debt securities ("CalPERS's claims") as untimely. Pet. App. 7a, 12a.[2] There is no dispute that the Class Action Complaint—which asserted the identical claims on behalf of a class that included CalPERS—had been timely filed. But by the time CalPERS filed its own individual complaint to litigate those same claims on its own behalf directly, more than three years had passed since the relevant debt securities were offered to the public.

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[1] The notice explained that "[u]nless you exclude yourself [from the settlement], you give up any right to sue the Settling Underwriter Defendants or any of the other released parties for the claims being released by the Underwriter Settlement." J.A. 95. "To exclude yourself from the Underwriter Class, you must send a letter by mail saying that you want to be excluded from the Underwriter Class in the *In re Lehman Brothers Equity/Debt Securities Litigation – Settling Underwriter Defendants Settlement*, Case No. 08-CV-5523 (LAK)." J.A. 95.

[2] CalPERS's Section 11 claims relating to one of the six debt securities proceeded, because that security had been offered to the public fewer than three years prior to the filing of CalPERS's Complaint. CalPERS also asserted claims under Section 10(b) of the Securities Exchange Act of 1934, which are subject to a five-year limitations period. That litigation resulted in various settlements. Those are not before the Court. After the final resolution of all its claims, CalPERS timely appealed the dismissal of its Section 11 claims with respect to the five other debt offerings.

The district court held that CalPERS's claims were barred by Section 13. The court rejected CalPERS's argument that the timely filing of the Class Action Complaint rendered CalPERS's claims timely under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974)). Pet. App. 10a-13a. Consequently, with respect to the relevant debt securities, CalPERS was stripped of any recovery and respondents were absolved of liability to CalPERS, both in connection with the Class Action settlement (from which CalPERS had opted out) and CalPERS's Complaint (which was dismissed as untimely).

The Second Circuit affirmed. Pet. App. 6a. The court of appeals reasoned that the case was controlled by its prior ruling in *Police & Fire Retirement System of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013), *cert. granted sub nom. Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, 134 S. Ct. 1515 (2014), *cert. dismissed as improvidently granted*, 135 S. Ct. 42 (2014). In *IndyMac*, retirement pension systems from Detroit and Wyoming filed separate putative class actions alleging that the defendant made false and misleading statements in multiple offerings of mortgage-backed securities. The cases were consolidated, with Wyoming appointed lead plaintiff and Detroit instead only an unnamed class member. *Id.* at 102-03.

Wyoming's amended complaint included allegations regarding certain securities that Detroit had purchased but Wyoming had not. The district court subsequently determined that Wyoming lacked standing to assert those claims. Detroit then moved to

intervene to assert those claims, but by that time three years had passed since the securities were offered to the public. *See id.*

The Second Circuit held in *IndyMac* that the claims were barred by Section 13. It reasoned that Section 13 is a statute of repose and, "while statutes of limitations are often subject to tolling principles, a statute of repose *extinguishes* a plaintiff's cause of action" and therefore is not subject to equitable tolling. *Id.* at 106 (quotation marks and citations omitted). The court of appeals further held that even if *American Pipe* tolling is not "equitable" in nature, the Rules Enabling Act precluded any tolling of Section 13's three-year period. *Id.* at 109.[3]

The Second Circuit held in this case that *IndyMac* required dismissal of CalPERS's claims, and that it made no difference that CalPERS had filed its complaint during the pendency of a properly filed class action that was ultimately certified. Pet. App. 4a-5a. This Court granted certiorari.

SUMMARY OF ARGUMENT

I. The ruling below cannot be reconciled with *American Pipe*. In that decision, this Court unanimously interpreted Rule 23 of the Federal Rules of Civil Procedure to provide that the filing of a class action complaint (i) commences the action for all class members, whether named or not, and moreover (ii) tolls the limitations periods applicable to the underlying

---

[3] This Court granted certiorari in *IndyMac* but dismissed the writ as improvidently granted in light of a settlement between the parties.

cause of action if the class action fails, leading unnamed class members to intervene in the suit. In reaching this conclusion, the Court recognized that the filing of a class action complaint simultaneously streamlines the process of litigation while putting defendants on notice of the claims against them. On the other hand, *American Pipe* and its progeny explain that forcing the unnamed class members to file protective pleadings—whether in the form of motions to intervene or individual complaints—early in a class action would scrap the efficiencies that Rule 23 seeks to achieve without providing any real benefit to defendants.

The Second Circuit's holdings in *IndyMac* and in this case cannot be reconciled with *American Pipe*. By creating an overwhelming incentive for unnamed class members to file individual pleadings early in class litigation, the Second Circuit's rule will—in the best-case scenario—generate tremendous waste and inefficiency for district courts. In the far more likely scenario, the Second Circuit's rule will generate even more waste and inefficiency by also precipitating premature opt-outs from class procedures that will impose massive costs on defendants and the courts alike. These problems will be acutely felt in securities cases, and cases under Section 11 in particular, which typically are brought as class actions, take a substantial amount of time to resolve, and often feature institutional plaintiffs that will likely feel compelled to file their own complaints under the Second Circuit's rule.

The *American Pipe* rule also upholds the constitutionally protected right to opt out of class

actions. This Court has recognized that it would violate due process to bind a putative class member in a Rule 23(b)(3) class against its will. Thus, all class members have a constitutional right to opt out to pursue their own claims with their own lawyers. In this case, all CalPERS did was attempt to exercise this right: it opted out of the class at the earliest practicable moment to pursue the same claims via its own complaint.

Plainly, the right to opt out would be illusory if it stood for nothing more than the right to have one's claims dismissed as time-barred. After all, no rational plaintiff would opt out under such circumstances. The Second Circuit's rule thus effectively strips the opt-out right from every class member that lacks the foresight or wherewithal to file its own complaint within the three-year limitations period. Without the ability to opt out, those class members will not only lose the ability to vindicate their own interests, but also lose the principal check they have to ensure that class counsel and the class representatives vigorously represent them. Representative plaintiffs and their counsel, in turn, will be less accountable to the unnamed class members, and may face their own perverse incentives to advance their own individual interests over those of the class as a whole. The harm would accrue most severely to smaller investors—a result that is not only constitutionally problematic, but at odds with the remedial purposes of the federal securities laws, and with the holding of *American Pipe*.

On the other hand, a judgment reversing the Second Circuit would validate and serve the purposes of efficiency and fairness that this Court sustained in

American Pipe. Here, the Court can achieve that result in one of two ways: (1) by holding that CalPERS's action was timely regardless of tolling because it was brought in the Class Action Complaint and then continuously maintained when CalPERS filed its own complaint and opted out of the settlement; or (2) by holding that the time for CalPERS to file its individual complaint was tolled by the timely filing of the Class Action Complaint.

II. The first argument is the easiest path to reversal. By its terms, Section 13 provides that no "action" may "be brought" more than three years after a security is offered to the public. 15 U.S.C. § 77m. In *American Pipe*, the Court explained that the filing of a class action brings the action for all members, whether named or not. In this case, the Class Action Complaint thus commenced all of CalPERS's claims against each respondent, and did so on CalPERS's behalf. CalPERS's "action," *i.e.*, its cause of action, was therefore "brought" within three years of the date that the relevant securities were offered to the public, and it was timely under Section 13. The fact that CalPERS then filed an individual complaint and opted out of the class did not "bring" its "action"—it merely transferred control over the existing action from the class representatives to CalPERS.

As the Court made clear in *American Pipe*, recognizing the timeliness of CalPERS's claims would not interfere with the purposes underlying Section 13. Because CalPERS only seeks to assert claims that were timely brought in the Class Action Complaint, respondents have no basis to plead surprise or disruption of their repose.

Against these considerations, respondents have argued that the word "action" in Section 13 refers to a lawsuit, and not to a cause of action—so that what matters is when CalPERS filed its individual complaint, and not when its claims were first brought. That interpretation is untenable because it is inconsistent with this Court's precedents, unduly formalistic, and unhinged from the purposes underlying Section 13. At bottom, the complaint is a mere vessel for the causes of action, and the fact that a class member places its causes of action into a new vessel does not alter when those claims were brought against the defendants.

For these reasons, CalPERS's action was timely brought—and because the action was continuously maintained, there is no need to consider tolling doctrine.

III. If this Court instead assesses this case through the lens of tolling, it should hold that CalPERS's action was timely because *American Pipe* tolling applies to the three-year period in Section 13. The Second Circuit reached a contrary result by determining that as a statute of repose, the three-year period is not subject to any tolling. While this Court's precedents hold that under a statute of repose, the time to *initiate* a claim cannot be *equitably* tolled, that reasoning does not apply to the distinct doctrine of *American Pipe* tolling, under which the claim is initiated by the timely filing of the class action complaint. Thus, the Second Circuit's reasoning is foreclosed by this Court's precedents.

The Second Circuit was in any event wrong to deem the three-year period a statute of repose. At the time Section 13 was enacted, Congress did not distinguish

between statutes of limitations and statutes of repose—and in fact, the three-year period has consistently been described by this Court and members of Congress as a statute of limitations. There is no compelling justification whatsoever to treat the three-year period differently from the one-year period, in light of the textual similarities between the two.

The Second Circuit relied heavily on this Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), and on the Rules Enabling Act, 28 U.S.C. § 2072(b). But neither supports the Second Circuit's holding.

Lampf determined the applicable limitations period for the implied right of action under Section 10(b) of the Exchange Act, not Section 11. In the process, the Court described the three-year period in a time-bar statute resembling Section 13 as a period of repose that is not subject to equitable tolling. But *Lampf* is inapposite because (1) the holding of the case actually supports the proposition that as long as litigation commences in a timely fashion, a plaintiff's claim is timely; and (2) the textual analysis the Court used in *Lampf* to hold that equitable tolling did not apply does not apply to *American Pipe* tolling, which is not a form of equitable tolling and not based on the discovery of injury.

The Rules Enabling Act likewise provides no support to respondents' position. The statute prohibits procedural rules from abridging substantive rights. But this Court has explained that in order to run afoul of the Act, a procedural rule must actually regulate substantive law, *i.e.*, the rules of decision. *American*

Pipe tolling does no such thing; instead, it only regulates how the claims of putative class members are presented—through either the class complaint or an individual complaint.

That point is especially clear in this case because if CalPERS had remained in the class, it would have received value for its claims in the settlement. Thus, respondents are not objecting to being held liable on CalPERS's claims; they are only objecting to CalPERS pursuing those claims individually with its own attorneys, instead of through the class representatives. That is a quintessentially procedural issue.

Moreover, Section 13 itself does not speak of creating substantive rights in defendants; it merely tells plaintiffs when they must bring their actions. That, too, is a procedural restriction. But even if Section 13 does create some substantive rights, it surely does not give respondents the right to force CalPERS to remain in the class on pain of losing its claims.

ARGUMENT

In this case, the Class Action Complaint timely commenced all of CalPERS's claims against each respondent, thus bringing CalPERS's action on its behalf. Subsequently, as the Class Action dragged on, CalPERS took control over its piece of the pending action. It did so by filing an individual complaint and opting out of the Class Action settlement. The Second Circuit, extending the flawed rule it adopted in *IndyMac*, held that CalPERS's claims were untimely because CalPERS's individual complaint was filed after the expiration of the three-year period in Section 13,

which it held constitutes a statute of repose. The Second Circuit's premise and conclusion were wrong in *IndyMac*, and they are doubly wrong here because under *American Pipe*, CalPERS's action was timely brought whether the three-year period constitutes a statute of repose or not. This Court should reverse.

I. *American Pipe* And Its Progeny Establish That CalPERS's Action Was Timely.

In *American Pipe*, this Court held that the timely filing of a class action complaint satisfies the relevant limitations periods for all class members—whether named or not—by initiating the claims of every member and putting the defendants on notice of those claims. That reasoning holds true whether the period in question is deemed a statute of limitations or a statute of repose: in either case, the timely filing of a class complaint informs the defendant of the "generic identities" of all plaintiffs and of their "substantive claims." *American Pipe*, 414 U.S. at 555. A contrary conclusion would not only fail to achieve the purposes of repose, but it would also sap the efficiencies that make class actions useful. *American Pipe*'s reasoning applies with full force in this case. A holding that CalPERS's complaint was timely would advance the purposes of the *American Pipe* rule; the contrary result would thwart them.

A. *American Pipe* Is An Established Feature Of Federal Civil Procedure.

1. In *American Pipe*, Utah filed a putative antitrust class action on the heels of a case brought by the United States. The district court denied class certification,

leading putative class members to move to intervene. Those motions were filed after the expiration of the Clayton Act's limitations provision (since amended), under which a private action "'shall be forever barred unless commenced . . . within'" one year after the conclusion of an antitrust suit brought by the United States. *American Pipe*, 414 U.S. at 541-42 & n.3 (quoting 15 U.S.C. § 16(b) (1970)). Because the putative class members were no longer parties to the case on the date their motions were filed, the question was whether the filing of the class complaint tolled the limitations period for the members until the date the class action failed through the denial of class certification.

This Court held that the answer was "yes" based on its interpretation of Rule 23. The Court opened by discussing the history and purpose of the rule. It explained that under the prior version of Rule 23, some courts had concluded that a class action was a device to permit joinder or intervention, and had therefore required such individual motions for joinder or intervention to satisfy the timeliness requirements applicable to the relevant cause of action. *American Pipe*, 414 U.S. at 549-50. But the 1966 amendments to Rule 23 transformed the class action from "an invitation to joinder" into "a truly representative suit." *Id.* at 550. This transformation removed all of the "conceptual or practical obstacles in the path of holding that the filing of a timely class action complaint commences the action for all members of the class as subsequently determined." *Id.* Thus, "[w]hatever the merit in the conclusion that one seeking to join a class after the running of the statutory period asserts a 'separate cause of action' which must individually meet the

timeliness requirements, such a concept is simply inconsistent with Rule 23." *Id.* Instead, the unnamed, putative "members of the class stood as parties to the suit until and unless they received notice thereof and chose not to continue." *Id.* at 551.

Amended Rule 23 was "designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." *Id.* at 550. The rule could not accomplish this goal, however, if putative class members were "induced to file protective motions to intervene or to join in the event that a class was later found unsuitable," because such filings would generate "precisely the multiplicity of activity which Rule 23 was designed to avoid." *Id.* at 551, 553. The Court was therefore "convinced that the rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Id.* at 554. "[T]his interpretation" of Rule 23, the Court concluded, is "necessary to insure effectuation of the purposes of litigative efficiency and economy." 414 U.S. at 555-56. *See also Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002) (explaining that without *American Pipe*, "one of the major goals of class action litigation—to simplify litigation involving a large number of class members with similar claims—would be defeated").

The Court determined that tolling under these circumstances was also fully consistent with the purposes of limitations periods: to thwart the revival of stale claims and provide defendants with notice of their

potential exposure to liability. *American Pipe*, 414 U.S. at 554-55. Such provisions "are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Id.* at 554 (quotation marks and citation omitted). By notifying the defendants "of the substantive claims being brought against them" and "of the number and generic identities of the potential plaintiffs who may participate in the judgment," a putative class action complaint "satisfie[s]" these statutory purposes. *Id.* at 554-55 (quotation marks and citation omitted). "Within the period set by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation, whether the actual trial is conducted in the form of a class action, as a joint suit, or as a principal suit with additional intervenors." *Id.* at 555.

On the other hand, *American Pipe* disclaimed reliance on the equitable principle that tolling is only available for plaintiffs who exercise diligence. Instead, as the Court explained, "[w]e think no different a standard should apply to those members of the class who did not rely upon the commencement of the class action (or who were even unaware that such a suit existed) and thus cannot claim that they refrained from bringing timely motions for individual intervention or joinder because of a belief that their interests would be represented in the class suit." *Id.* at 551. That is because *American Pipe* tolling seeks to uphold the purposes of Rule 23, not some judge-made equitable principle. *See Chardon v. Fumero Soto*, 462 U.S. 650,

654, 661 (1983) (*American Pipe* "interpreted the Federal Rules of Civil Procedure to permit a federal statute of limitations to be tolled between the filing of an asserted class action and the denial of class certification" in order to achieve the "federal interest in assuring the efficiency and economy of the class action procedure").

2. In the ensuing decades, this Court has never questioned the wisdom of the *American Pipe* rule. In fact, the Court has repeatedly reaffirmed and extended it. In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 & n.13 (1974), which arose in part under the securities laws, the Court recognized that *American Pipe* tolling was critical to ensuring that class members who received notice and an opportunity to opt out of the class could exercise that constitutional right.

In *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), the Court held that absent class members seeking to appeal the denial of class certification may intervene after final judgment. The Court reasoned that "[t]he lawsuit had been commenced by the timely filing of a complaint for classwide relief, providing United with 'the essential information necessary to determine both the subject matter and size of the prospective litigation.'" *Id.* at 392-93 (quoting *American Pipe*, 414 U.S. at 555).

In *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), the Court held that *American Pipe* tolling applies to putative class members who choose to file their own complaints instead of intervening. *Id.* at 353-54. The Court recognized that limiting *American Pipe* to intervenors would produce the same "needless

multiplicity of actions" that it had previously sought to avoid. *Id.* at 351.

For decades after *Crown, Cork & Seal Co.*, this Court has never cast doubt on the reasoning of *American Pipe*. When this Court's recent cases have discussed *American Pipe*, they have likewise recognized the rule's continuing validity and importance. In *Devlin*, the Court held that unnamed class members need not intervene in order to appeal from the denial of their objection to a settlement's approval. The Court explained that "[n]onnamed class members are . . . parties [to a class action] in the sense that the filing of an action on behalf of the class tolls a statute of limitations against them," citing *American Pipe* for the proposition. 536 U.S. at 10. It further reasoned that without such tolling, "all class members would be forced to intervene to preserve their claims, and one of the major goals of class action litigation—to simplify litigation involving a large number of class members with similar claims—would be defeated." *Id.* In *Smith v. Bayer Corp.*, 564 U.S. 299, 313 n.10 (2011), the Court described *American Pipe* and *McDonald* as "two cases in which we held that a putative member of an uncertified class may wait until after the court rules on the certification motion to file an individual claim or move to intervene in the suit." And, in *Credit Suisse Securities (USA) LLC v. Simmonds*, 566 U.S. 221 (2012), the Court reiterated that, "[i]n *American Pipe*, we held that 'commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.'" *Id.* at 1419 n.6 (quoting *American Pipe*, 414 U.S. at 554).

In addition to this Court's decisions, the lower courts have cited *American Pipe* more than 1800 times. Learned commentators have likewise confirmed that the *American Pipe* rule is an entrenched feature of federal civil procedure. The leading treatise has explained that "[t]here is no problem with regard to the statute of limitations under Rule 23" because "commencement of the action tolls the statute of limitations for all members of the class." Charles A. Wright & Mary Kay Kane, *Law of Federal Courts* 474 (8th ed. 2017). And that principle is recognized as a "key aspect of class action practice." 3 William B. Rubenstein et al., *Newberg on Class Actions* § 9:53, at 565 (5th ed. 2013).

Congress and this Court have also amended the Federal Rules of Civil Procedure thirty times since the *American Pipe* decision, and five of those amendments have affected Rule 23. *See* Staff of the H. Comm. on the Judiciary, 114th Cong., Federal Rules of Civil Procedure ix-xiii (2016) (historical notes to the Rules). Congress also has comprehensively addressed class action procedure through legislation, both generally (in the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4) and in securities laws in particular (in the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 737, and the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227). In none of those instances did Congress or the Court alter the *American Pipe* rule. *American Pipe* is therefore entitled to the highest respect under principles of statutory *stare decisis*. *See Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409-11 (2015) (holding that only Congress

should alter this Court's statutory decisions unless their statutory and doctrinal underpinnings erode, or they prove unworkable); *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2411 (2014) (holding, with respect to securities laws, that "[t]he principle of *stare decisis* has special force in respect to statutory interpretation because Congress remains free to alter what we have done") (quotation marks and citation omitted)).

B. The Second Circuit's Decision Undermines The Interests This Court Sought To Protect In *American Pipe* And Its Progeny.

The Second Circuit's ruling in this case deals a grave blow to the interests this Court sought to protect in *American Pipe* and its progeny. That is because every single class member with any material stake in a Section 11 case—and certainly every fiduciary responsible for safeguarding investors' assets—will likely feel compelled to file a protective parallel individual complaint before the three-year period elapses, even if a timely filed class action is pending.

The Second Circuit's rule would produce a logistical and risk management nightmare for courts and defendants. The filing of individual complaints inevitably creates inertia: once a plaintiff with a substantial claim hires a lawyer, pays for the preparation of its own complaint, and files in its own name, it will naturally be more inclined to also want to participate in the management of the case, including motion practice, discovery, and settlement discussions. Even if the defendants succeed in such cases, courts will likely have to contend with multiple individual

plaintiffs pursuing their own appeals. *Cf., e.g., Gelboim v. Bank of Am. Corp.*, 135 S. Ct. 897 (2015) (holding that appeals in consolidated cases can proceed separately).

District courts would be placed in the unenviable position of managing these cacophonous litigants, addressing the disparate discovery requests of each plaintiff, and dealing with counsel for each plaintiff. And although a district court often may, as a formal matter, stay the parallel individual cases and attempt to channel the litigation through the lead plaintiff of the class action, requests for such stays will themselves produce costly collateral litigation, and the prospect that a substantial number of plaintiffs would later opt out of the class and go it alone will nevertheless hang over the class proceedings. Although that risk exists to some degree under any rule, the Second Circuit's rule will increase the number of opt-outs by creating an overwhelming incentive to file individual suits, and therefore make litigation and settlement more difficult and expensive for parties and courts.[4]

The filing of a large number of individual complaints is particularly likely and undesirable in securities cases, for three reasons. First, registration statements and prospectuses for public securities are

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[4] The *best*-case scenario is that all of the individual protective complaints will be meaningless: the plaintiffs will remain members of the class, recover (or not) through the class mechanism, and the individual complaints will become moot. But even in that best-case scenario, there would still be truly massive waste because in the interim the plaintiffs would have incurred the expense of individual filings for no benefit, while district courts will have had to manage them and defendants respond to them.

often widely disseminated, and a Section 11 class action may include *thousands* of members—making it highly likely that a large number of unnamed plaintiffs will have substantial claims that justify individual filings. For example, there are "[h]undreds of opt-outs," including twenty-seven very large institutional investors, from the class action in *In re: Petrobras Securities Litigation*, 312 F.R.D. 354, 359 (S.D.N.Y. 2016), where the *IndyMac* rule governs.

Second, given the complexity of these cases, it is common that a ruling on class certification does not occur before the expiration of the three-year period. *See infra* at 25-26. Class members will therefore feel compelled at the outset to protect themselves by filing their own complaints. But this proliferation of filings would run directly counter to the objectives of the PSLRA, which embodies Congress's desire that securities class actions be helmed by a sophisticated lead plaintiff—as opposed to myriad plaintiffs advancing a flotilla of complaints. *See* 15 U.S.C. § 78u-4(a)(3). The point of the PSLRA is to decrease the cost of litigation for defendants and the courts (which is why, for example, it institutes a stay of discovery until motions to dismiss are denied). But encouraging the filing of individual actions will have the opposite effect.

As bad as all of that is, the Second Circuit's rule produces an even worse result if plaintiffs do not respond by filing their own individual complaints within three years of the date the securities were offered. Any plaintiff who fails to do so effectively forfeits the right to opt out of the class and becomes beholden to the class representatives and their counsel,

who will therefore have one fewer check giving them an incentive to pursue the unnamed plaintiffs' interests in litigation or settlement. Thus, the unnamed plaintiff may be forced to accept inadequate representation or an inadequate judgment. That outcome will disproportionately harm smaller investors who lack the awareness or wherewithal to file protective individual complaints—*i.e.*, the investors who most need the protection offered by the federal securities laws.

C. *American Pipe* Upholds The Due Process Right To Opt Out Of Class Litigation.

Applying *American Pipe* in this case would also preserve class members' right to opt out of a class action and pursue their own causes of action individually. "In the context of a class action predominantly for money damages," this Court has "held that absence of notice and opt-out violates due process." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011) (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)). Indeed, it is "our deep-rooted historic tradition that everyone should have his own day in court." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (quotation marks omitted). The opt-out right upholds that tradition by preventing unwilling class members from being involuntarily bound by class action judgments that extinguish their individual claims—including by settlement—and by giving them autonomy over how their claims are litigated.

As *American Pipe* and its progeny explain, where possible, it is more efficient, and therefore preferable, for plaintiffs to remain in the class and rely on the class representatives and counsel. But it often takes a while

before a class member can determine whether the class action will vindicate its interests. More often than not, the developments that motivate class members to opt out—*e.g.*, the conclusion of dispositive motion practice and/or a proposed settlement—do not occur until well after the three-year period specified by Section 13 has expired. That is because the class complaint itself may not be filed until shortly before the expiration of the period.

Even when a class action is filed well before the three-year limitations period expires, the early stages of securities class litigation (including the lead plaintiff appointment process and the stay of discovery while dispositive motions are filed) can take years, especially if appeals are involved. This case is a good example: the first class complaint was filed in 2008, but when CalPERS filed its individual complaint in February 2011, class counsel had yet to even file a class certification motion. And this case is by no means unusual. For more than a decade, the time from the filing of a securities class action complaint to a class certification decision has exceeded two years in approximately 66% of cases. NERA Economic Consulting, *Recent Trends in Securities Class Action Litigation: 2016 Full-Year Review* 23 (Jan. 23, 2017), http://tinyurl.com/huw5q8y. In those cases asserting Securities Act claims, it was likely that plaintiffs would not have had a chance to evaluate the settlement and opt out before Section 13's three-year period had expired. The time exceeded three years in 36% of cases. *Id.* In these cases, it was guaranteed that plaintiffs

would not have had the opportunity to opt out before the three-year period elapsed.[5]

To interpret a limitations period to bar the claims of timely opt-outs from a class action settlement would violate due process. Many class members will not even be aware of the lawsuit from which they must opt out until they receive the class notice after the three-year period has already expired. And the constitutionally conferred right to opt out would in practice be a nullity if it stood for nothing more than the right to opt out and file an individual claim that must then be dismissed as time-barred. *See Crown, Cork & Seal Co.*, 462 U.S. at 351-52 (recognizing the need for the opt-out right to remain meaningful even after the limitations period has run); *Eisen*, 417 U.S. at 176 & n.13 (same).

The due process problem is especially acute in the commonplace circumstance in which the complaint states multiple claims subject to different limitations periods. Take, for example, a class complaint that alleges claims under Section 11 of the Securities Act (subject to the three-year limitations period in Section 13) and Section 10(b) of the Exchange Act (subject to a five-year limitations period). *See, e.g., Herman & MacLean v. Huddleston*, 459 U.S. 375, 383 (1983)

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[5] Some cases take far longer. In *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014), for example, the class complaint was filed in 2002, but when the case most recently reached this Court more than a decade later, the class certification litigation still had not been resolved. *See also Erica P. John Fund, Inc. v. Halliburton Co.*, No. 15-90038, 2015 WL 10714013, at *1 (5th Cir. Nov. 4, 2015) (granting Halliburton's petition to appeal class certification yet again).

(noting that "conduct actionable under § 11 may also be actionable under § 10(b)"). Under the Second Circuit's rule, class members with multiple meritorious claims who are dissatisfied with the class representatives will find themselves in a pickle in year four because there is no mechanism by which they can opt out in part. *See, e.g.*, J.A. 94 (class notice, requiring opting out of the settlement altogether). Plaintiffs in such a case can either opt out to pursue their Exchange Act claims, at the cost of forfeiting their Section 11 claims (which will be deemed time-barred under the Second Circuit's rule), or they can remain in the class and accept sub-par representation as the price of maintaining all of their claims (including those that are not subject to Section 13's three-year period).

Again, this case provides an illustration. CalPERS had claims under both the Securities Act and the Exchange Act, and the underlying debt securities were offered to the public on different dates. Under the rule the Second Circuit adopted, CalPERS could either remain in the settlement and accept a lower value for all of its claims, or opt out and forfeit some of them altogether. But there is no sound reason why a limitations period should be interpreted to force a plaintiff to sacrifice some meritorious claims in order to pursue others. Or, to put it slightly differently, there is no reason to hold that, under Section 13, a plaintiff's timely decision to opt out of a class action somehow transforms a timely Securities Act claim into an untimely one.

Indeed, the fact that respondents were willing to pay value for CalPERS's claims in the Class Action

settlement proves that it is *only* CalPERS's decision to opt out and pursue its claims individually that, in the Second Circuit's view, prohibited CalPERS from recovering on those very same claims. If this Court adopts that view, membership in a class would effectively become mandatory for any class member that did not file its own opt-out complaint within the three-year limitations period. Under the doctrine of constitutional avoidance, this Court should eschew an interpretation of Section 13 that imposes such a severe burden on the exercise of well-established due process rights. *Cf. Ortiz*, 527 U.S. at 845-46 (applying constitutional avoidance to prevent the certification of a mandatory class to settle claims for money damages).

* * * * *

When this Court granted certiorari in *IndyMac*, it faced a series of doctrinal knots that it had to untie to determine whether *American Pipe* tolling applies to the three-year limitations period in Section 13. These included whether Section 13's three-year period is a statute of limitations or a statute of repose, whether *American Pipe* tolling is legal or equitable, and whether the Rules Enabling Act permits any tolling of Section 13's three-year period. The correct answer to those questions is that *American Pipe* tolling applies with equal force to both the one-year and the three-year limitations periods in Section 13. *See infra* Part III.

However, the Court can resolve this case more simply by holding that CalPERS's Complaint was timely without regard to tolling. "Tolling" of a deadline is only necessary during a period in which the plaintiff has no live claim. But as *American Pipe* makes clear,

CalPERS's causes of action were brought with the timely filing of the Class Action Complaint. CalPERS then seamlessly took control of its claims by filing an individual complaint while the class action was still pending, and then opting out of the class. Thus, the claims were timely brought, and continuously maintained. Because this argument is the easiest way to resolve the case, we address it next.

II. CalPERS's Action Was Timely Regardless Of Tolling.

When, as here, a class member files an individual complaint alleging a Section 11 cause of action while a properly filed class action asserting the same cause of action is pending, the individual complaint is timely. "[W]hen an unnamed, putative class member later files its own individual claim, it is not instituting a new action subject to the statute of limitations and statute of repose; it is simply taking over the prosecution of its individual claim from the putative class representative." *In re BP p.l.c. Sec. Litig.*, No. 4:13-CV-1393, 2014 WL 4923749, at *4 (S.D. Tex. Sept. 30, 2014). Therefore, the case does "not involve 'tolling' at all" because the plaintiff "has effectively been a party to an action against these defendants since a class action covering him was requested but never denied." *Joseph v. Wiles*, 223 F.3d 1155, 1168 (10th Cir. 2000).

A. The Text And Purpose Of Section 13, As Well As *American Pipe*'s Explanation Of When An Action Is Brought, Establish That CalPERS's Action Was Timely Without Regard To Tolling.

The text of Section 13, 15 U.S.C. § 77m, sets forth two straightforward time limitations. The first requires that the action be "brought" within one year of when the plaintiff knew or should have known of the false statement. This provides a "discovery" rule. The second requires that the action "be brought" within three years of the date that the security was offered to the public. This provides a superseding outer boundary from the date the particular security was offered to the public to bring the action, which does not depend on the plaintiff's diligence or knowledge of the claim. Both limitations periods specify when a Section 11 action must be "brought." It is settled that "'[b]rought' in this context means 'commenced.'" *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1568 (2016).

CalPERS's action was timely brought under Section 13 through the filing of the Class Action Complaint. The statute uses the passive phrase "be brought," indicating that individual plaintiffs need not bring their own actions to satisfy the time bar—instead, "actions" are timely as long as they are "brought" by somebody. In *American Pipe*, this Court held—wholly apart from the question of tolling—that under "Rule 23 . . . the filing of a timely class action complaint commences the action for all members of the class as subsequently determined." 414 U.S. at 550. Thus, the

filing of the Class Action Complaint timely "brought" the claims of every class member, including CalPERS.

That must be so. No other act "brings" the class member's claim. If the claim were instead deemed brought on some later date—such as the settlement date—no class member could recover through the class action process, except if the litigation miraculously concludes within three years of the date of the relevant registration statement. Plaintiffs would race to the courthouse without fairly assessing whether they have a valid claim. Defendants would attempt to run out the clock through arduous motions practice. No public purpose would be served, which is why no statutory time bar functions in that manner.

In this case, CalPERS's individual Section 11 action is entirely encompassed within the Class Action Complaint. CalPERS was a member of the class defined by that complaint. Thus, the timely filing of the Class Action timely "brought" CalPERS's claims. Even if it could be said that CalPERS also later "brought" the same claim a second time by filing its individual complaint, that would not change the fact that the claim was already "brought" by the Class Action Complaint—satisfying Section 13.

Moreover, no subsequent act "unbrought" CalPERS's claim; Section 13 does not indicate that such "unbringing" would even be possible, and it would serve no apparent purpose. But even if such a case could exist, this is not it. The Class Action Complaint was never dismissed as meritless. Nor (in contrast to the facts of *IndyMac*) did the district court find some flaw under Rule 23, such as that the class representative was

inadequate. To the contrary, the case settled and the district court certified a settlement class. By that time, CalPERS had already filed its individual complaint—and then as soon as practicable, it opted out of the class action to pursue its action through that complaint.

Recognizing the timeliness of CalPERS's Complaint is also fully consistent with the purposes underlying the federal securities laws, and Section 13 in particular. As this Court has explained:

> Limitations periods are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights, but these ends are met when a class action is commenced. Class members who do not file suit while the class action is pending cannot be accused of sleeping on their rights; Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims. And a class complaint notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment. The defendant will be aware of the need to preserve evidence and witnesses respecting the claims of all the members of the class.

Crown, Cork & Seal Co., 462 U.S. at 352-53 (quotation marks and citations omitted). When a class action is timely filed, "the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation, whether the actual trial is conducted in the form of a class action,

as a joint suit, or as a principal suit with additional intervenors." *American Pipe*, 414 U.S. at 554-55.

That reasoning applies fully to Section 13 as well. The statute provides that, once three years have passed since an offering, a new action cannot be brought. But this Court has emphasized that the securities laws should be construed "not technically and restrictively, but flexibly to effectuate [their] remedial purposes." *SEC v. Zandford*, 535 U.S. 813, 819 (2002) (quotation marks and citation omitted). As part of that body of law, limitations periods should be construed "consonant with the legislative scheme" they support. *American Pipe*, 414 U.S. at 558.

In this case, that necessarily means construing Section 13 to recognize that CalPERS's Section 11 action was first brought in the Class Action Complaint. That is because the number and identity of claims against respondents did not change when CalPERS took over its individual piece of the litigation by filing its own complaint and opting out of the Class Action. Only two things had changed: respondents had to deal with CalPERS and its attorneys instead of the lead plaintiff and counsel; and CalPERS was able to exercise its constitutional right not to accept a settlement of its own money claim that it deemed insufficient. But avoiding those outcomes is not an interest that Section 13 was designed to address, and so here, as in *American Pipe*, recognizing the timeliness of CalPERS's Complaint "is in no way inconsistent with the functional operation of a statute of limitations." 414 U.S. at 554.

B. Respondents' Contrary Position Is Untenable.

Respondents defend the ruling below as compelled by the text of Section 13. They argue that CalPERS's "action" was "brought" when it filed its individual complaint—and is therefore untimely—because an "action" refers to the formality of a separate lawsuit, and not to the substance of a plaintiff's claim. That argument is unpersuasive because in this context, the word "action" means a "cause of action," which refers to a claim for relief, and not the complaint as a document.

The Securities Act does not define "action." But the most instructive case is this Court's unanimous decision in *Jones v. Bock*, 549 U.S. 199 (2007), which dealt with the exhaustion requirement of the Prison Litigation Reform Act. In language quite similar to Section 13, that statute provides that "[n]o action shall be brought" absent exhaustion. 42 U.S.C. § 1997e(a). The question in *Jones* was whether the failure to exhaust a single *claim* required dismissal of the entire *complaint*. The Court held that it did not, reasoning that the statute's "boilerplate" language referring to "actions" means individual claims, and not entire complaints. 549 U.S. at 220. It supported its reasoning by citing statute-of-limitations cases, recognizing that such statutes frequently refer to "actions," but noting that "we have never heard of an entire complaint being thrown out simply because one of several discrete claims was barred by the statute of limitations, and it is hard to imagine what purpose such a rule would serve." *Id.*

There is no reason to read the word "action" in Section 13 any differently. Deeming the "action" to be

the plaintiff's complaint makes no sense in this context because Congress would not have been concerned whether a *complaint* was "brought" within a certain number of years after the offering of the securities. The complaint may contain a variety of claims that have nothing to do with the registration statement at all. Instead, Section 13 is obviously directed at when the *claim* that is subject to the three-year period—here, CalPERS's claim under Section 11—was brought, wholly apart from whether the complaint also includes other claims that are not governed by Section 13.

Reading the word "action" to mean a cause of action is also the most harmonious way to interpret the securities laws generally. *See, e.g.*, *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2535 (2015) ("One ordinarily assumes Congress means the same words in the same statute to mean the same thing.") (quotation marks and citation omitted)). Section 11, which Section 13 limits, refers to a "cause of action." 15 U.S.C. § 77k(a). Similarly, the time bars applicable to claims under Section 10 (fraud) and Section 20A (insider trading) of the Exchange Act use the word "action" to refer to a "private right of action" to enforce the securities fraud laws or the laws against insider trading. 28 U.S.C. § 1658(b); 15 U.S.C. § 78t-1(a), (b)(4). The term "private right of action" means an individual claim or cause of action within a complaint—not an entire lawsuit. *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 282-84 (2001) (using the phrases "private cause of action" and "private right of action" interchangeably).

Interpreting the word "action" to instead mean a complaint would produce nonsensical results. For example, if a plaintiff waited four years after a security was offered to the public to file a complaint stating multiple causes of action—all but one of which were timely—it would make no sense to dismiss the entire lawsuit on account of that claim alone.

Take the opposite example: imagine that within one year a plaintiff filed a complaint asserting a state law claim, but five years later amended that complaint to add a cause of action under Section 11. Respondents surely would not concede that the "action" was timely because the complaint was "brought" when it was filed.

Perhaps most tellingly, imagine that, more than three years after a security was offered to the public, a new plaintiff sought to *intervene* in a timely filed *pre-existing* individual suit. Respondents certainly would maintain that intervention "brought" a new "action," even if the new plaintiff's claim would proceed under the same civil case number as the prior, timely filed suit. That is because everybody understands that the word "action" in this context means a cause of action under Section 11, rather than the complaint.

Consider as well instances in which new complaints are filed for other reasons, including administrative ones. It is hard to understand how under respondents' reading class counsel can take the commonplace step of filing an amended complaint with the same claims outside the three-year period. Or take a complaint that originally named two plaintiffs, one of which severs its existing Section 11 claim into its own complaint for unrelated reasons, such as to add its own unique, timely

claim under another statutory provision, or to seek venue in a more convenient forum. It is nonsensical to say that Congress intended those plaintiffs to forfeit their Section 11 claims.

Another way to think about this issue is to acknowledge that opting out of a class action to assert the same claim individually does not, as a functional matter, bring a new claim because all the opt-out plaintiff does is take over the piece of the action that always belonged to it. True, the plaintiff files an individual complaint as part of the process. But the complaint is merely a new vessel for the plaintiff's piece of the existing cause of action. The cause of action itself is what subjects the defendant to liability. Because Section 13 is concerned with the defendant's liability, and not the vessel it comes in, the filing of the opt-out complaint cannot be the relevant event for purposes of the statute.

In sum, the easiest way to decide this case is to hold that when, as here, a class member files an individual complaint asserting the same claim as a timely filed still-pending class action complaint, the individual complaint is timely without regard to tolling because the claim was brought when the class action was filed, and then maintained by the individual plaintiff.

III. The Rule Of *American Pipe* Tolls The Three-Year Limitations Period In Section 13 Of The Securities Act.

If the Court instead determines that tolling is required in this case, or concludes it is best to resolve the case on tolling grounds, then it should hold that

under *American Pipe*, the three-year limitations period in Section 13 was tolled by the timely filing of the Class Action Complaint. CalPERS's Complaint was therefore timely filed as well.

American Pipe held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class." 414 U.S. at 554. Section 13 provides that an "action . . . to enforce any liability created under" Section 11 may only be maintained if it is "brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence," and that no such action may "be brought . . . more than three years after the security was bona fide offered to the public." 15 U.S.C. § 77m.

Nobody doubts that *American Pipe* tolling applies to the one-year limitations period. But the Second Circuit held in *IndyMac* that *American Pipe* does not apply to the three-year period because that period is a statute of repose, and therefore cannot be tolled *in any respect*. 721 F.3d at 107. The court reasoned that courts have no authority to equitably toll a statute of repose, and that even non-equitable tolling (*i.e.*, "legal" or "statutory" tolling) is prohibited under the Rules Enabling Act. *See id.* at 109. The Second Circuit's reasoning is incorrect.

A. *American Pipe* Tolling Applies Equally To Statutes Of Limitations And Statutes Of Repose.

1. At its core, the Second Circuit's error stems from its failure to apprehend the way that *American Pipe*

tolling accounts for the role of statutes of repose. "Statutes of repose effect a legislative judgment that a defendant should be free from liability after the legislatively determined period of time." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014) (quotation marks and citation omitted). They are triggered by some event other than the accrual of the plaintiff's claim—usually (but not always) by the misconduct itself. Thus, even if the plaintiff's claim has not accrued (*e.g.*, because there has been no injury), the statute of repose will protect the defendant from liability. *See id.* at 2182.

This Court has recognized that statutes of repose "generally may not be tolled." *Id.* at 2183. Specifically, such statutes are not subject to equitable tolling, which permits a plaintiff to file an action after a limitation period expires if he "has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." *Id.* (quotation marks and citation omitted). The focus of the equitable tolling inquiry is on the plaintiff's diligence. By contrast, a statute of repose prioritizes the defendant's peace. Because no amount of plaintiff diligence can provide a defendant with peace, there is no way to reconcile permitting a plaintiff to bring a new claim after the expiration of a statute of repose.

Obviously—but critically—the protection of the statute of repose relates only to *new* assertions of liability. For example, a timely filed lawsuit is not automatically dismissed if it is still pending on the day the repose period elapses. Similarly, the statute of repose does not bar every development that might

increase the amount of money that the defendant owes on a pending claim (for example, the belated discovery of evidence of intent, which might defeat a defense of good faith at trial). It only bars the plaintiff from bringing in new claims.

Statutes of repose thus may prohibit the *equitable* tolling of the time to *initiate* an action, but the mere fact that a time limitation is deemed a statute of repose does not foreclose tolling if the plaintiff's claim *was already timely filed* before the expiration of the repose period. As explained more fully in Part I, *supra*, *American Pipe* tolling in particular is fully consistent with the purpose of a statute of repose. As this Court explained, the filing of the class action "notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." 414 U.S. at 555; *cf. id.* at 558 (explaining that the filing of a prior state lawsuit can "fulfill[] the policies of repose and certainty" served by a limitations period on a federal action). Because *American Pipe* only applies to claims that have already been timely asserted in a putative class action, there is no potential for surprise or for new liability. *See Developments in the Law—Class Action*, 89 Harv. L. Rev. 1391, 1451 (1976) ("[A] defendant faced with information about a potential liability to a class cannot be said to have reached a state of repose that should be protected."); *Crown, Cork & Seal Co.*, 462 U.S. at 353 (explaining that because the defendant "will be aware of the need to preserve evidence and witnesses respecting the claims of all the members of the class," tolling "creates no potential for

unfair surprise, regardless of the method class members choose to enforce their rights").

2. That reasoning is particularly applicable here. Section 11 claims turn entirely on the veracity of the defendant's statements; they do not require proof of either intent to defraud or investors' reliance on the defendant's statements. *See Omnicare*, 135 S. Ct. at 1323.[6] Consequently, a class action complaint that identifies the class of plaintiffs, the offering documents, and the untrue statements or misleading omissions gives the defendants the same information they would have had if each individual plaintiff had filed its own complaint on that day, and the omission of the names of all of the plaintiffs from the class complaint changes nothing. With respect to the Section 11 claim in this case, respondents do not have a straight-faced argument that, once the Class Action Complaint was filed, they were in a state of repose vis-à-vis CalPERS's claim.

Consequently, even accepting the proposition that the three-year period in Section 13 constitutes a statute of repose, it nevertheless is subject to tolling under *American Pipe* because "the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the

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[6] In certain limited circumstances, investors are required to show reliance if the issuer's earning statements covering at least twelve months from the date of the registration statement have been made available to investors. 15 U.S.C. § 77k(a). But "such reliance may be established without proof of the reading of the registration statement." *Id.*

statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose," *American Pipe*, 414 U.S. at 559—and this is such a circumstance.

On respondents' contrary view, *American Pipe* itself was seemingly wrongly decided, because the provision tolled in that case reads much like the three-year period of Section 13. The relevant provision of the Clayton Act provided that "any action to enforce such cause of action shall be forever barred unless commenced . . . within the period of suspension." *American Pipe*, 414 U.S. at 542 n.3 (quoting 15 U.S.C. § 16(b) (1970)). The "period of suspension" was the period "during the pendency" of a "civil or criminal proceeding . . . instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws," and "one year thereafter." *Id.* at 541-42 (quotation marks and citation omitted). Thus, like the three-year period in Section 13, the relevant provision of the Clayton Act was triggered not by the accrual of the plaintiff's claim, but by an event over which the plaintiff had no control: the conclusion of a federal enforcement action. And just like the three-year provision in Section 13, the Clayton Act set forth the time bar using strong language. Nevertheless, *American Pipe* found that tolling was warranted.

B. In Any Event, Section 13 Is A Statute Of Limitations And On That Basis Is Subject To *American Pipe* Tolling.

The foregoing arguments all assume that the three-year period in Section 13 is a statute of repose. The better view, however, is that it is a statute of

limitations, necessarily subject to *American Pipe* tolling.

As this Court recognized in *CTS Corp.*, Congress and the courts have frequently used the terms "statute of limitations" and "statute of repose" interchangeably. 134 S. Ct. at 2186. As late as 1979—five years after *American Pipe* was decided—*Black's Law Dictionary* stated that "[s]tatutes of limitations are statutes of repose." *Id.* (quoting *Black's Law Dictionary* 835 (5th ed. 1979) (quotation marks omitted)). The same was true when Section 13 was enacted. *See Black's Law Dictionary* 1120 (3d ed. 1933). Indeed, dictionaries at that time stated that statutes of limitations "fix[] the period of time after a cause of action has accrued, within which an action thereon must be brought," and further stated that such limitations provisions "are often referred to as statutes of repose." *Ballentine's Law Dictionary* 1233 (2d ed. 1930).

It is unsurprising, then, that Congress and this Court have referred to Section 13, as a whole, as a "limitations" provision, not a statute of repose. *See* 15 U.S.C. § 77m (entitled "Limitations of actions")[7]; *see also Ernst & Ernst*, 425 U.S. at 210 ("Section 13 specifies a statute of limitations of one year from the time the violation was or should have been discovered, in no event to exceed three years from the time of offer

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[7] "[S]tatutory titles and section headings are tools available for the resolution of a doubt about the meaning of a statute." *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008) (quotation marks and citation omitted).

or sale"); *see also Merck & Co. v. Reynolds*, 559 U.S. 633, 646 (2010) (referring to "limitations periods in the federal securities laws," including Section 13).[8]

It also makes sense that this Court has grouped the two time periods together because they are merely two sentences in the same statutory paragraph, with remarkably similar texts. The one-year sentence provides that "[n]o action shall be maintained," and the three-year sentence provides "[i]n no event shall any such action be brought." 15 U.S.C. § 77m. Both use comparably strong language to achieve the same effect. Thus, it makes sense to treat both provisions as "statutes of limitations," both subject to *American Pipe* tolling.[9]

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[8] More broadly, this Court has used the terms interchangeably. As recently as 2007, the Court referred to a time limitation as a statute of repose and a statute of limitations (in the very next sentence of the opinion). *See Wallace v. Kato*, 549 U.S. 384, 391 (2007). And an addendum to the petitioner's brief in *IndyMac* highlighted 25 other instances in which the Court equated statutes of limitations and repose.

[9] The legislative history likewise supports the conclusion that the three-year period of Section 13 is a statute of limitations. During the floor debates in the Senate on what was to become the Securities Exchange Act of 1934 (which amended the time bars in Section 13), Senator Norris expressed some confusion about why it was necessary to have two limitations periods. *See* 78 Cong. Rec. 8198 (1934). Senator Barkley responded, "The lapse of the [longer period] bars [the plaintiff] from bringing suit at all where he has made the discovery. But if within that time he makes discovery of fraud and damage, then he is required to bring his suit within 1 year after such discovery." *Id.* The one-year period, Senator Barkley added, "does not extend *the real statute of limitations*"; it

C. Neither This Court's Decision In *Lampf* Nor The Rules Enabling Act Suggests That *American Pipe* Tolling Does Not Apply To The Three-Year Period In Section 13.

In *IndyMac*, the Second Circuit reached the opposite conclusion based on its reading of *Lampf*, which described multiple timing provisions in the securities laws, including Section 13, as "a 1-year period after discovery combined with a 3-year period of repose," and concluded that equitable tolling, under which "the bar of the statute does not begin to run until the fraud is discovered," was "unnecessary" for the one-year period because it already incorporates a discovery rule, and "inconsistent with" the three-year period of repose, which was designed "to serve as a cutoff." 501 U.S. at 360, 363 (quotation marks and citation omitted).

The Second Circuit's reliance on *Lampf* is misguided for three reasons. First, *Lampf*'s holding was that "[l]itigation instituted pursuant to § 10(b) and Rule 10b-5 therefore *must be commenced* within one year after the discovery of the facts constituting the violation and within three years after such violation." *Id.* at 364 (emphasis added) (footnote omitted). This holding actually supports CalPERS's argument because in this case, the "litigation"—*i.e.*, the Class Action—was "commenced . . . within three years" of the violation. *Lampf* does not say that an individual complaint must be filed within three years when the complaint merely

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"simply requires that within that statute of limitations, if he makes discovery of fraud, he must bring his suit within 1 year." *Id.* (emphasis added).

constitutes the continuation of that pre-existing litigation.

Second, the Court in *Lampf* concluded that it would make no sense to incorporate a discovery rule into both the one-year and three-year periods because Congress had already spoken directly to that question by expressly incorporating the discovery rule into the former, not the latter. But there is no comparable textual anomaly arising from applying *American Pipe* tolling to both time periods in Section 13.

Third, the holding of *Lampf* was limited to equitable tolling. But *American Pipe* is not an equitable tolling rule. *See Credit Suisse Sec. (USA) LLC*, 566 U.S. at 226 n.6 (noting a distinction between equitable tolling and "legal" tolling, and acknowledging that some federal courts have used the latter term to describe *American Pipe*); *Albano v. Shea Homes Ltd. P'ship*, 634 F.3d 524, 538 (9th Cir. 2011) (acknowledging that "the weight of federal authority favors the view that *American Pipe / Crown, Cork* rule should be characterized as a rule of statutory tolling"). Indeed, the Court in *American Pipe* disclaimed the equitable inquiry described in *Lampf* (*i.e.*, whether the plaintiff has been diligent) because *American Pipe* tolling extends even to those plaintiffs "who did not rely upon the commencement of the class action (or who were even unaware that such a suit existed)." 414 U.S. at 551. *See also* Part I, *supra*.

Instead, *American Pipe* tolling is either *sui generis*, or it is a form of legal tolling because it sets forth an "interpretation" of Rule 23 that the Court deemed "necessary to insure effectuation of the purposes of

litigative efficiency and economy that the Rule in its present form was designed to serve." *Id.* at 555-56. The Court explored the history of Rule 23 in detail, comparing different versions of the rule and discussing key provisions. *See id.* at 545-56 & n.11. It focused on the notice and opt-out procedures that Rule 23(c) requires for a class certified under Rule 23(b)(3). *See id.* at 547-49. It concluded that those procedures removed any "conceptual or practical obstacles in the path of holding that the filing of a timely class action complaint commences the action for all members of the class as subsequently determined." *Id.* at 550. The Court found "simply inconsistent with Rule 23 as presently drafted" the alternative possibility that "one seeking to join a class after the running of the statutory period asserts a separate cause of action which must individually meet the timeliness requirements." *Id.* (quotation marks and citation omitted).[10]

The Second Circuit reasoned that even if *American Pipe* tolling is derived from Rule 23, and therefore "legal" rather than "equitable," it cannot be used to toll a statute of repose because the Rules Enabling Act would prohibit that result. That statute provides that this Court may prescribe general rules of practice and procedure, but that "[s]uch rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C.

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[10] On occasion, this Court has, in passing dictum, referred to *American Pipe* as a form of equitable tolling. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 n.3 (1990); *Young v. United States*, 535 U.S. 43, 49 (2002). Aside from being dictum, the rationale for these references is unclear, and for the reasons stated above, they are incorrect.

§ 2072(b). The Second Circuit concluded that because a statute of repose gives the defendant a substantive right to be free from liability, no interpretation of the Federal Rules can modify it.

That is incorrect. As this Court has explained, "[t]he test is not whether the Rule affects a litigant's substantive rights; most procedural rules do." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (plurality opinion). Instead, "[w]hat matters is what the Rule itself *regulates*: If it governs only the manner and the means by which the litigants' rights are enforced, it is valid; if it alters the rules of decision by which [the] court will adjudicate [those] rights, it is not." *Id.* (quotation marks and citation omitted). In this case, Rule 23 and *American Pipe* tolling purely regulate procedure: specifically, whether CalPERS must enforce its rights by remaining in the class action, or whether it may do so in the alternative by taking control over its own claim. Any suggestion that respondents' substantive rights are being abridged rings hollow because if CalPERS had remained in the class, respondents would have no grounds to challenge the timeliness of its claims. Thus, in reality, respondents are not objecting to an untimely action at all: they are objecting only to CalPERS pursuing its claim individually instead of through the class. There simply is no authority for the proposition that defendants have a "substantive right" to force plaintiffs to litigate their Section 11 claims through a class representative. If anything, CalPERS has a substantive due process right to opt out of the class action and supervise its own claims—not the other way around.

Section 13 itself likewise says nothing about creating or extinguishing substantive rights. It does not say, for example, that the right to recover will expire, or that the defendant's liability will be negated. Instead, it says only that an action may not be maintained or brought past a certain time—which is garden-variety statute of limitations language. *See Young*, 535 U.S. at 47; *see also, e.g.*, *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604, 610 (2013) ("Statutes of limitations establish the period of time within which a claimant must bring an action."); *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 416 (1998) ("The terms of a typical statute of limitation provide that a cause of action may or must be brought within a certain period of time."). Such limitations are quintessentially procedural because they govern how and when plaintiffs must present their claims, not the parties' substantive rights.[11]

American Pipe itself rejected an indistinguishable argument. The defendant had argued that the limitations period in that case established a "substantive" statute of limitations that was "immune from extension by 'procedural' rules." 414 U.S. at 556. The Court explained, however, that "the fact that the right and limitation are written into the same statute does not indicate a legislative intent as to whether or when the statute of limitations should be tolled." *Id.* at 557 (quotation marks and citation omitted). It

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[11] Of course, this is not to suggest that Congress could not enact a time-limitations period extinguishing a defendant's liability. But it is to say that Congress did not do so in 1933 and 1934, when it enacted and modified Section 13.

elaborated that "[t]he proper test is not whether a time limitation is 'substantive' or 'procedural,' but whether tolling the limitation in a given context is consonant with the legislative scheme." *Id.* at 557-58. Applying that test to its tolling rule, the Court recognized that tolling has a long pedigree in precedent. *See id.* at 558-59. And it held that because tolling was consistent with the purposes underlying the limitations period in the Clayton Act, the Rules Enabling Act did not pose any obstacle. *See id.* at 558 n.29.

The same, of course, is true with respect to Section 13, which in the relevant sense parallels the Clayton Act's limitations period. For the reasons explained more fully above, it is entirely consonant with the legislative purpose of the three-year period to toll it for putative class members asserting Section 11 claims that were originally brought in a timely filed class action.

CONCLUSION

The Second Circuit's decision should be reversed.

Respectfully submitted,

Darren J. Robbins
Joseph D. Daley
Thomas E. Egler
ROBBINS GELLER
RUDMAN & DOWD LLP
655 West Broadway
Suite 1900
San Diego, CA 92101

Thomas C. Goldstein
Counsel of Record
Tejinder Singh
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
tg@goldsteinrussell.com

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RECORDS AND BRIEFS

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In the
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CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM,

Petitioner,

v.

ANZ SECURITIES, INC., et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS

VICTOR L. HOU
JARED GERBER
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, NY 10006

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
MATTHEW D. ROWEN
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Respondents

March 29, 2017

QUESTION PRESENTED

In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974), this Court held that the filing of a putative class action suspends applicable statutes of limitations for any party that would have been a member of the class. As a result, a later-filed individual action by a would-be class member is not time-barred even if it is filed after the applicable limitations period has run. Unlike statutes of *limitations*, however, statutes of *repose* "put[] an outer limit on the right to bring a civil action," and thus serve as an "absolute ... bar" to the defendant's liability. *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182-83 (2014). Since this Court decided *Waldburger*, every circuit court to consider the issue has held that *American Pipe* tolling does not apply to a statute of repose, like the three-year limit in Section 13 of the Securities Act.

Although the petition in this case set forth two questions presented, this Court granted certiorari limited to a single question:

Does the filing of a putative class action serve, under the *American Pipe* rule, to satisfy the three-year time limitation in Section 13 of the Securities Act with respect to the claims of putative class members?

CORPORATE DISCLOSURE STATEMENT

Respondent ANZ Securities, Inc. is an indirectly wholly owned subsidiary of Australia and New Zealand Banking Group Limited ("ANZ"). Upon information and belief, ANZ has no parent company, and no publicly traded company owns 10% or more of its stock.

BFA Tenedora de Acciones, S.A.U. (formerly Banco Financiero y de Ahorros, S.A.U.) ("BFA") owns 50% or more of Respondent Bankia, S.A. and BFA is wholly owned by the Fondo de Reestructuración Ordenada Bancaria, an entity overseeing the recapitalization and restructuring of the Spanish banking system. No publicly traded company owns 10% or more of Bankia, S.A.

Respondent BBVA Securities Inc. is a wholly owned subsidiary of BBVA Compass Bancshares, Inc., which is a wholly owned subsidiary of Banco Bilbao Vizcaya Argentaria, S.A. No publicly held corporation owns 10% or more of Banco Bilbao Vizcaya Argentaria, S.A.

Respondent BMO Capital Markets Corp., formerly known as Harris Nesbitt Corp., is indirectly wholly owned by Bank of Montreal. No publicly held corporation owns 10% or more of Bank of Montreal.

On November 30, 2011, Fortis Securities LLC changed its name to BNP Paribas FS, LLC. Respondent BNP Paribas FS, LLC is a wholly-owned, indirect subsidiary of BNP Paribas. BNP Paribas is a publicly traded company organized under the laws of France. BNP Paribas has no parent company and no publicly-held corporation owns 10% or more of its shares.

Respondent BNP Paribas is a publicly traded company organized under the laws of France. BNP Paribas has no parent company and no publicly held corporation owns 10% or more of its shares.

Respondent BNY Mellon Capital Markets, LLC (which was formerly named Mellon Financial Markets, LLC and is the successor-in-interest to BNY Capital Markets, Inc.) is a wholly owned subsidiary of The Bank of New York Mellon Corporation. No publicly held corporation owns 10% or more of The Bank of New York Mellon Corporation.

Respondent CIBC World Markets Corp. is a wholly owned subsidiary of Canadian Imperial Bank of Commerce, which is a publicly traded company. No publicly held company owns 10% or more of Canadian Imperial Bank of Commerce's stock.

Respondent Citigroup Global Markets Inc. is wholly-owned by Citigroup Financial Products Inc., which is wholly-owned by Citigroup Global Markets Holdings Inc., which is wholly-owned by Citigroup Inc.

Respondent Daiwa Capital Markets Europe Limited (f/k/a Daiwa Securities SMBC Europe Limited) is a wholly owned subsidiary of Daiwa International Holdings Inc., which is a wholly owned subsidiary of Daiwa Securities Group Inc. No publicly traded company owns 10% or more of the stock of Daiwa Securities Group Inc.

Respondent DZ Financial Markets LLC is a wholly owned subsidiary of DZ Bank AG. DZ Bank AG does not have any corporate or other parent

corporation or any publicly held corporation that owns 10% or more of its stock.

Respondent HSBC Securities (USA) Inc. is wholly owned by HSBC Markets (USA) Inc., which, in turn, is wholly owned by HSBC Investments (North America) Inc., which, in turn, is wholly owned by HSBC North America Holdings Inc., which, in turn, is indirectly held by HSBC Holdings plc. Upon information and belief, no publicly traded company owns more than 10% of the stock of HSBC Holdings plc.

Respondent ING Financial Markets LLC is wholly owned by ING Financial Holdings Corporation, which, in turn, is wholly owned by ING Bank N.V., which, in turn, is wholly owned by ING Groep N.V. No publicly traded company owns more than 10% of the shares of ING Groep N.V.

The parent company of Respondent Mizuho Securities USA Inc. is Mizuho Securities Co., Ltd.; the parent company of Mizuho Securities Co., Ltd., is Mizuho Financial Group, Inc.; no publicly held corporation owns 10% or more of Mizuho Securities USA Inc.'s stock.

Respondent Muriel Siebert & Co., Inc. is a wholly owned subsidiary of Siebert Financial Corp. No publicly traded corporation owns 10% or more of Siebert Financial Corp.

Respondent nabSecurities, LLC (f/k/a National Australia Capital Markets, LLC) is a wholly owned subsidiary of National Australia Bank Limited, a publicly traded company on the Australian Stock Exchange. As of October 31, 2015, the companies that own 10% or more of National Australia Bank

Limited's stock are HSBC Custody Nominees (Australia) Limited and JP Morgan Nominees Australia Limited.

Respondent Natixis Bleichroeder Inc., is now known as Natixis Securities Americas LLC. Its sole member is Natixis North America LLC. Natixis North America LLC is an indirectly wholly owned subsidiary of Natixis S.A., a public company that is 71% owned by Groupe BPCE. No other publicly held corporation owns 10% or more of Natixis S.A.'s stock.

Respondent RBC Capital Markets, LLC (f/k/a RBC Capital Markets Corporation) is an indirect wholly-owned subsidiary of Royal Bank of Canada, which is publicly traded on the New York Stock Exchange and the Toronto Stock Exchange.

Respondent RBS Securities Inc. (formerly named Greenwich Capital Markets, Inc., incorrectly named herein as Greenwich Capital Markets a/k/a RBS Greenwich Capital) is a wholly owned subsidiary of RBS Holdings USA Inc. (formerly named Greenwich Capital Holdings, Inc.). No publicly held company owns 10% or more of RBS Securities Inc.'s stock. RBS Holdings USA Inc. is a privately held corporation that is an indirect but wholly owned subsidiary of The Royal Bank of Scotland Group plc ("RBS Group"). Other than RBS Group, no publicly held company owns 10% or more of RBS Holdings USA Inc.'s stock. No publicly held company owns 10% or more of RBS Group's stock.

Respondent RBS WCS Holding Company, the legal successor to defendant ABN AMRO Inc., is wholly owned by The Royal Bank of Scotland N.V., which is wholly owned by RBS Holdings N.V., which

is wholly owned by RFS Holdings B.V., which is approximately 97.7% owned by RBS Group. No publicly held corporation owns 10% or more of the stock of RBS Group.

Respondent Santander Investment Securities, Inc. is an indirect, wholly owned subsidiary of Banco Santander, S.A., which is a publicly traded corporation. There is no publicly traded corporation that owns more than 10% of the stock of Banco Santander, S.A.

Respondent Scotia Capital (USA) Inc. is a wholly owned subsidiary of Scotia Holdings (US) Inc. Scotia Holdings (US) Inc. is wholly owned by BNS Investments Inc., which is 100% owned by the Bank of Nova Scotia. No publicly traded company owns 10% or more of the Bank of Nova Scotia.

Respondent SG Americas Securities, LLC is a limited liability company and wholly owned by SG Americas Securities Holdings, LLC. SG Americas Securities Holdings, LLC is a wholly owned subsidiary of Société Générale, S.A., which is a publicly traded company. Upon information and belief, no other publicly held corporation owns 10% or more of Société Générale, S.A.

Respondent Sovereign Securities Corporation, LLC is a wholly owned subsidiary of Santander Bank, N.A. (formerly known as Sovereign Bank), which, in turn, is a wholly owned subsidiary of Santander Holdings USA, Inc. (formerly known as Sovereign Bancorp, Inc.), which, in turn, is wholly owned by Banco Santander, S.A., a publicly traded corporation organized under the laws of the Kingdom of Spain. There is no publicly traded corporation that

owns more than 10% of the stock of Banco Santander, S.A.

Respondent SunTrust Capital Markets Inc. (n/k/a SunTrust Robinson Humphrey, Inc.) is a wholly owned subsidiary of SunTrust Banks, Inc. As of June 10, 2015, BlackRock, Inc., a publicly traded company, beneficially owned 11.4% of the common stock of SunTrust Banks, Inc.

Respondent Utendahl Capital Partners, L.P. is a Delaware limited partnership and Utendahl Partners, L.P. is the general partner. Utendahl Partners, L.P. has no subsidiaries or affiliates that are publicly held, and no publicly held corporation owns 10% or more of the stock of Utendahl Partners, L.P.

Respondent Wachovia Securities, LLC (n/k/a Wells Fargo Advisors, LLC) is a wholly owned indirect subsidiary of Wells Fargo & Company, a publicly traded corporation organized under the laws of the State of Delaware. Berkshire Hathaway Inc. owns more than 10 percent of the shares of Wells Fargo & Company.

Respondent Wells Fargo Securities, LLC, a limited liability company organized under the laws of Delaware, is a wholly-owned subsidiary of EVEREN Capital Corp. EVEREN Capital Corp. is a wholly owned subsidiary of Wells Fargo & Company, a publicly traded corporation organized under the laws of the State of Delaware. Berkshire Hathaway Inc. owns more than 10 percent of the shares of Wells Fargo & Company.

TABLE OF CONTENTS

QUESTION PRESENTED i
CORPORATE DISCLOSURE STATEMENT ii
TABLE OF AUTHORITIES x
INTRODUCTION 1
STATEMENT OF THE CASE 4
A. Section 13's One-Year Statute of Limitations and Three-Year Statute of Repose 4
B. The Lehman Brothers Class Action 7
C. Petitioner's Individual Action 8
D. Petitioner Opts Out of the Class Action With Full Awareness That Its Individual Action Could Be Dismissed as Untimely 9
E. The District Court Dismisses Petitioner's Individual Suit as Time-Barred and the Second Circuit Affirms 11
F. This Court Grants Certiorari Only as to the First Question Presented 12
SUMMARY OF ARGUMENT 13
ARGUMENT 18
I. Section 13's Three-Year Bar Is A Statute Of Repose That May Not Be Extended Under Any Circumstances 18
A. Section 13's Three-Year "In No Event" Bar Is Unequivocally a Statute of Repose 18
B. Statutes of Repose Are Not Subject to Equitable Tolling 26

C. *American Pipe* Established an Equitable Tolling Rule That Does Not Apply to Section 13's Three-Year Statute of Repose 27

D. Petitioner's Argument That *American Pipe* Established a "Legal" Tolling Rule Fails 31

II. Petitioner's Argument That Its Individual Action Is Timely "Regardless Of Tolling" Is Outside The Scope Of The Question Presented And Wrong On The Merits 38

A. The Court Expressly Declined To Grant Certiorari on This Issue 39

B. Petitioner's Alternative Theory Fails on the Merits 41

III. Petitioner's Policy Arguments Do Not Support Disregarding The Three-Year Statute Of Repose 46

A. Petitioner's Parade of Horribles Is Illusory 47

B. Petitioner's Preferred Rule Would Undermine, Not Further, the Purposes of Rule 23 and the PSLRA 51

C. Applying Section 13's Three-Year Statute of Repose as Written Would Not Violate Due Process 54

CONCLUSION 59

TABLE OF AUTHORITIES

Cases

Albano v. Shea Homes Ltd. P'ship,
634 F.3d 524 (9th Cir. 2011) 28

Amchem Prods., Inc. v. Windsor,
521 U.S. 591 (1997) 49, 52

Am. Pipe & Constr. Co. v. Utah,
414 U.S. 538 (1974) ..... *passim*

Barnett v. DynCorp Int'l, L.L.C.,
831 F.3d 296 (5th Cir. 2016) 34

Beach v. Ocwen Fed. Bank,
523 U.S. 410 (1998) 37

Cal. Pub. Emps.' Ret. Sys. v. Fuld,
No. 11-cv-00562-EDL (N.D. Cal.) 8

Chardon v. Fumero Soto,
462 U.S. 650 (1983) 32, 33

Credit Suisse Sec. (USA) LLC v. Billing,
551 U.S. 264 (2007) 5

Credit Suisse Sec. (USA) LLC v. Simmonds,
566 U.S. 221 (2012) 31, 32

Crown, Cork & Seal Co. v. Parker,
462 U.S. 345 (1983) 28, 52

CTS Corp. v. Waldburger,
134 S. Ct. 2175 (2014) ..... *passim*

DeKalb Cty. Pension Fund
v. Transocean Ltd.,
817 F.3d 393 (2d Cir. 2016) 31

Dusek v. JPMorgan Chase & Co.,
832 F.3d 1243 (11th Cir. 2016) 30

Gabelli v. SEC,
133 S. Ct. 1216 (2013) 22

Genesis Healthcare Corp. v. Symczyk,
133 S. Ct. 1523 (2013) 45

Glus v. Brooklyn E. Terminal,
359 U.S. 231 (1959) 29

Goad v. Celotex Corp.,
831 F.2d 508 (4th Cir. 1987) 34

Greyhound Corp. v. Mt. Hood Stages, Inc.,
437 U.S. 322 (1978) 30

Holmberg v. Armbrecht,
327 U.S. 392 (1946) 29

In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.,
860 F. Supp. 2d 1062 (C.D. Cal. 2012) 50

In re IndyMac Mortg.-Backed Sec. Litig.,
793 F. Supp. 2d 637 (S.D.N.Y. 2011) 10

In re Lehman Bros. Sec. & ERISA Litig.,
799 F. Supp. 2d 258 (S.D.N.Y. 2011) 10

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800 F. Supp. 2d 477 (S.D.N.Y. 2011) 10

In re Lehman Bros.,
No. 09-md-02017-LAK-GWG
(S.D.N.Y. filed Jan. 9, 2009) 8

In re Petrobras Sec. Litig.,
312 F.R.D. 354 (S.D.N.Y. 2016) 48

Irwin v. Dep't of Veterans Affairs,
498 U.S. 89 (1990) 14, 19, 26, 29

Jones v. Bock,
549 U.S. 199 (2007) 43, 44

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,
501 U.S. 350 (1991) ..... *passim*

Lozano v. Montoya Alvarez,
134 S. Ct. 1224 (2014) 19, 21, 29

Merck & Co. v. Reynolds,
559 U.S. 633 (2010) 23

Norris v. Wirtz,
818 F.2d 1329 (7th Cir. 1987) 25

Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund,
135 S. Ct. 1318 (2015) 4, 58

Operative Plasterers & Cement Masons Int'l Assoc. Local 262 Annuity Fund v. Lehman Bros. Holdings, Inc.,
No. 08-cv-05523-LAK-GWG (S.D.N.Y.) 7

Ortiz v. Fibreboard Corp.,
527 U.S. 815 (1999) 55

Pa. Dep't of Corr. v. Yeskey,
524 U.S. 206 (1998) 23

Pace v. DiGuglielmo,
544 U.S. 408 (2005) 29

Petrella v. Metro-Goldwyn-Mayer, Inc.,
134 S. Ct. 1962 (2014) 36

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) 54

Police & Fire Retirement System of Detroit v. IndyMac MBS, Inc.,
721 F.3d 95 (2d Cir. 2013) 11, 34

SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC, No. 15-927 (U.S. 2017) 36

Se. Pa. Transp. Auth. v. Lehman Bros. Holdings, Inc., No. 08-cv-02431 (N.D. Ill.) 7

Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010) 35

Sibbach v. Wilson & Co., 312 U.S. 1 (1941) 35

Smith v. Bayer Corp., 564 U.S. 299 (2011) 44

SRM Glob. Master Fund Ltd. P'ship v. Bear Stearns Cos. LLC, 829 F.3d 173 (2d Cir. 2016) 30

Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345 (2013) 44

Stein v. Regions Morgan Keegan Select High Income Fund, Inc., 821 F.3d 780 (6th Cir. 2016) 31

Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036 (2016) 35

United States v. Brockamp, 519 U.S. 347 (1997) 20, 21

Walker v. Armco Steel Corp., 446 U.S. 740 (1980) 32

Wallace v. Kato, 549 U.S. 384 (2007) 24

Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011) 35

Young v. United States,
535 U.S. 43 (2002) 29

Statutes

15 U.S.C. §77k(a) 4
15 U.S.C. §77m ..... *passim*
15 U.S.C. §77z-1(a)(3)(A)(i)(I) 43
15 U.S.C. §77z-1(a)(3)(A)(ii) 43
15 U.S.C. §77z-1(a)(3)(B)(iii) 52
15 U.S.C. §78u-6(h)(1)(B)(iii)(I)(aa) 24
15 U.S.C. §78u-4(a)(3)(B)(iii) 52
28 U.S.C. §1658(b) 23
28 U.S.C. §2072(b) 3, 15, 35
28 U.S.C. §2244(d)(2) 29
42 U.S.C. §2278 24
Pub. L. No. 73-22, 48 Stat. 74 (1933) 6

Rules

Fed. R. Civ. P. 23(b)(2) 54
Fed. R. Civ. P. 23(e)(2) 57

Other Authorities

78 Cong. Rec. (1934) 6, 7, 25
101 Cong. Rec. (1955) 37
54 C.J.S. *Limitations of Actions* §7 (2010) 21
Amir Rozen et al., Cornerstone Research,
Opt-Out Cases in Securities Class Action Settlements (2013) 47, 48
Amir Rozen et al., Cornerstone Research,
Opt-Out Cases in Securities Class Action Settlements, 2012–2014 Update (2016) 48

Black's Law Dictionary (3d pocket ed. 2006) 42

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Br. for United States as Amicus Curiae Supporting Neither Party, *Credit Suisse Sec. (USA) LLC v. Simmonds*, No. 10-1261 22

Br. for United States as Amicus Curiae Supporting Petitioner, *CTS Corp. v. Waldburger*, No. 13-339 34

Br. for United States in Opposition, *Lyon v. Augusta S.P.A.*, No. 01-569 34

Cal. Pub. Emps.' Ret. Sys. v. Fuld, No. 11-cv-01281-LAK (S.D.N.Y. Feb. 7, 2011), Dkt.1-1 10

Federal Securities Act: Hearing on H.R. 4314 Before the H. Comm. on Interstate and Foreign Commerce, 73d Cong. 169 (1933) 6

Filings Database, Securities Class Action Clearinghouse, Stanford Law School, http://stanford.io/1CscqnJ 47

H.R. 4314, 73d Cong. (1933) 5

H.R. 5480, 73d Cong. (1933) 6

H.R. Conf. Rep. No. 104-369 (1995) 52

Harold S. Bloomenthal, *Statutes of Limitations & The Securities Acts—Part I*, 7 Sec. & Fed. Corp. L. Rep. 17 (1985) 26

In re BP p.l.c. Sec. Litig., No. 4:13-cv-1393, 2014 WL 4923749 (S.D. Tex. Sept. 30, 2014) 40

In re Lehman Bros., No. 09-md-02017-LAK-GWG (S.D.N.Y. May 2, 2012), Dkt.894 10

James W. Beasley, Jr., Comm. on Fed. Regulation of Sec., *Report of the Task Force on Statute of Limitations for Implied Actions*, 41 Bus. Law. 645 (1986) 26

Order List (Jan. 13, 2017) 2, 13, 39

Order, *Visa, Inc. v. Osborn*, No. 15-961 (Nov. 17, 2016) 16, 41

Press Release, *CalPERS Achieves $12.75M Recovery from Ernst & Young LLP* (May 5, 2014), http://bit.ly/2nb1z28 9

Press Release, *CalPERS Recovers $117.7 Million in Time Warner Lawsuit* (Mar. 14, 2007), http://bit.ly/2ovCJXe 49

S. 875, 73d Cong. (1933) 5, 6

S. Rep. No. 104-98 (1995) 52

Stark v. Callan, No. 08-cv-09793-LAK (S.D.N.Y. Dec. 2, 2008), Dkt.8 7

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INTRODUCTION

Section 13 of the Securities Act of 1933 sets forth a one-year statute of limitations and then provides: "In no event shall any ... action" asserting a securities claim under Section 11 of the Act "be brought ... more than three years after the security was bona fide offered to the public." 15 U.S.C. §77m. The question in this case is whether the statutory phrase "[i]n no event" actually means "in some events," based on a judge-made rule designed to facilitate class actions. It does not. Section 13's three-year bar is a paradigmatic statute of repose that operates as an outer limit "on the right to bring a civil action" that may not be extended "for any reason," "even in cases of extraordinary circumstances." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182-83 (2014).

Nothing in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), is to the contrary. *American Pipe* held that the filing of a putative class action tolls applicable statutes of *limitations* for individual suits brought by plaintiffs who would have been members of the class. *Id.* at 554-55. That judge-made tolling rule is consistent with the longstanding tradition of extending statutes of limitations via judge-made rules like equitable tolling. But there is no comparable tradition of allowing judge-made rules to override statutes of *repose*, such as the three-year bar in Section 13. To the contrary, the immunity of statutes of repose from such judge-made rules is a large part of what distinguishes statutes of repose from statutes of limitations. Indeed, this Court has held in no

uncertain terms that "[s]tatutes of limitations, *but not statutes of repose*, are subject to equitable tolling." *Waldburger*, 134 S. Ct. at 2183 (emphasis added). That is what allows statutes of repose to give true repose.

Here, Petitioner filed an individual Section 11 action "more than three years after the security was bona fide offered to the public." 15 U.S.C. §77m. Petitioner nonetheless attempts to escape the plain text of Section 13 with a three-part argument. Petitioner opens with a policy argument that the "interests" underlying *American Pipe* apply equally to statutes of limitations and repose, follows with a case-specific argument on which this Court *expressly declined* to grant certiorari, and finally, nearly 40 pages into its brief, finishes by addressing the actual question presented and arguing that *American Pipe* tolling should apply to Section 13's three-year statute of repose.

Petitioner's arguments are profoundly flawed as a matter of both procedure and substance. This Court should not tolerate Petitioner's brazen end-run around the Court's order granting certiorari "limited to Question 1 presented by the petition." Order List (Jan. 13, 2017). Nor can Petitioner's policy arguments justify a judicial override of Congress' unequivocal three-year time limit. Petitioner predicts a torrent of protective filings if the Court affirms the majority approach of the Circuits. But Petitioner identifies zero evidence that its parade of horribles has *actually* come to pass in the Second Circuit, which handles the bulk of the Nation's securities litigation and has been living with the

IndyMac rule since 2013. Nor is there any due process problem with applying statutes of repose to class actions. Class members will still have a right to opt out, and to the extent the statute of repose incentivizes them to stay in the class and fight for a better classwide resolution, the entire class stands to benefit.

Petitioner's belated and relatively brief arguments addressing the actual question presented fare no better. Petitioner suggests that the three-year bar in Section 13 is a statute of limitations rather than a statute of repose, but that runs headlong into Section 13's plain text and this Court's holding that "[t]he 3-year limit is a period of repose inconsistent with tolling." *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991). Petitioner concedes, as it must, that if Section 13 is a statute of repose, then it is not subject to equitable tolling. Petitioner gamely tries to deny that *American Pipe* is a strain of equitable tolling, but that is both wrong and unavailing. Even if *American Pipe* were a form of "legal tolling" emanating from Rule 23, it still could not extend the three-year repose period in Section 13. Statutes of repose confer *substantive* rights to be free from suit after a specified period, and the Rules Enabling Act ensures that the Federal Rules of Civil Procedure will not "abridge, enlarge or modify any substantive right." 28 U.S.C. §2072(b). In the end, the doctrinal path for deciding the question on which this Court granted certiorari is straightforward: Section 13 is a statute of repose, and statutes of repose confer substantive rights, which are not subject to judge-made tolling.

STATEMENT OF THE CASE

A. Section 13's One-Year Statute of Limitations and Three-Year Statute of Repose

1. Under Section 11 of the Securities Act, purchasers of certain registered securities may bring suit against, *inter alia*, "every underwriter with respect to such security," for material misstatements or omissions in the securities' registration statements. 15 U.S.C. §77k(a). Unlike other provisions in the securities laws that require a showing of scienter, Section 11 imposes strict liability for material omissions or misrepresentations. *See Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1331 n.11 (2015).

That strict and potentially broad liability is ameliorated by the reality that a private party's right to sue under under Section 11 does not endure in perpetuity. Actions asserting Section 11 claims are subject to two separate time bars set forth in Section 13 of the Securities Act, which provides in relevant part:

> No action shall be maintained to enforce any liability created under [Section 11] ... unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence.... *In no event* shall any such action be brought to enforce a liability created under [Section 11] ... more than three years after the security was bona fide offered to the public....

15 U.S.C. §77m (emphasis added).

Section 13 thus contains a two-tiered structure of time limits. The first sentence creates a one-year statute of *limitations*, which begins to run only when the plaintiff discovers (or should have discovered) the untrue statement or omission. The second sentence, in contrast, creates a statute of *repose* that places a three-year outer limit on "any" Section 11 "action" against, *e.g.*, an underwriter, and employs the absolute "[i]n no event" formulation. A newly-filed action must satisfy both these time limits.

The certainty that Section 13's three-year repose period provides is particularly important to underwriters like Respondents. Underwriting is "central to the proper functioning of well-regulated capital markets." *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 276 (2007). Moreover, unlike insiders who typically risk liability only with respect to their own securities (over which they have substantial control), underwriters face potential litigation for every security they underwrite, which for active underwriters can be hundreds, if not thousands, of securities per year (even though many of the relevant variables are outside the underwriters' control). Section 13's three-year statute of repose ensures that underwriters are not deterred by the prospect of stale claims involving securities underwritten years earlier.

2. Congress did not arrive at this two-tiered structure by accident. The initial draft of what would become the Securities Act lacked any limitations or repose provisions. *See* H.R. 4314, 73d Cong. (1933); S. 875, 73d Cong. (1933). But legislators quickly

realized the danger in allowing "unprincipled lawyer[s]" to file securities claims in perpetuity. *Federal Securities Act: Hearing on H.R. 4314 Before the H. Comm. on Interstate and Foreign Commerce*, 73d Cong. 169 (1933) (statement of William C. Breed). Various solutions, including a single five-year limitations period, *see* S. 875, 73d Cong. §9 (1933), were considered, but Congress ultimately decided that a two-tiered structure would best serve the interests the statute sought to protect. *See* H.R. 5480, 73d Cong. §13 (1933). When the Securities Act first became law, Section 13 imposed a two-year statute of limitations (which ran from the date the violation was or should have been discovered) plus an absolute time bar that cut off claims ten years after a security was first offered to the public. *See* Pub. L. No. 73-22, §13, 48 Stat. 74, 84 (1933).

The original version of the Securities Act generated numerous objections from members of both industry and government, which led Congress to consider amendments to the statute after just one year. Some legislators proposed scrapping Section 13's two-tiered structure altogether and replacing it with a single time limit running from the date of the misrepresentation or omission. *See* 78 Cong. Rec. 8198-8203 (1934). But Congress resoundingly rejected such proposals, viewing the two-tiered framework as "just and fair to both sides." *Id.* at 8200. On the one hand, the limitations period "preserve[d] the right of a [plaintiff] who might not discover the falsity of a statement" within one year, because fraud may take longer to discover. *Id.* at 8200-01. On the other hand, a potential defendant ought to have a measure of repose at some point, lest

there be no "end [to] his fear, or the fear of his estate, of a suit." *Id.* at 8200.

Moreover, because an unduly long repose period could, *inter alia*, "deter" qualified candidates from "serving on boards of directors," Congress not only retained the two-tiered time limits, but *shortened* both limits to one and three years, respectively (from two and ten years). *See id.* at 8200-03. Although the Securities Act has subsequently been amended on various occasions, Section 13 and its two-tiered, one-and-three structure have remained unchanged for eight decades.

B. The Lehman Brothers Class Action

This case arises out of the bankruptcy of Lehman Brothers Holdings Inc., formerly one of the largest investment banks in the world. After the value of Lehman's stock began declining in early 2008, investors filed several securities fraud class actions against Lehman and certain of its officers and directors under Section 10(b) of the Securities Exchange Act of 1934. *See, e.g.*, *Se. Pa. Transp. Auth. v. Lehman Bros. Holdings, Inc.*, No. 08-cv-02431 (N.D. Ill.); *Operative Plasterers & Cement Masons Int'l Assoc. Local 262 Annuity Fund v. Lehman Bros. Holdings, Inc.*, No. 08-cv-05523-LAK-GWG (S.D.N.Y.).

Lehman filed for bankruptcy protection on September 15, 2008, which spurred still more litigation, including Securities Act actions naming underwriters of certain Lehman debt offerings as defendants. *See, e.g.*, *Stark v. Callan*, No. 08-cv-09793-LAK (S.D.N.Y. Dec. 2, 2008), Dkt.8. All of those actions were eventually consolidated in a

single, multi-district litigation in the Southern District of New York (the "Class Action"). *See In re Lehman Bros.*, No. 09-md-02017-LAK-GWG (S.D.N.Y. filed Jan. 9, 2009). The ultimate, operative complaint in the Class Action asserted, *inter alia*, Securities Act claims concerning Lehman debt security offerings involving dozens of purported underwriters, as well as Exchange Act claims against certain Lehman officers and directors. *Id.*, Dkt.30.

C. Petitioner's Individual Action

Petitioner CalPERS, which oversees nearly $300 billion in assets, is one of the largest and most sophisticated institutional investors in the world. It is also a frequent participant in securities litigation, and has recovered hundreds of millions of dollars in settlements in cases arising out of the financial crisis.

On February 7, 2011, more than three years after the relevant Lehman debt offerings were issued and before a class certification motion had even been filed in the New York litigation, Petitioner filed this individual action in the Northern District of California. *See Cal. Pub. Emps.' Ret. Sys. v. Fuld*, No. 11-cv-00562-EDL (N.D. Cal.). Petitioner's suit named as defendants not only Lehman officers and directors, but also numerous underwriters of Lehman debt securities. Shortly thereafter, Petitioner's individual action was transferred to the Southern District of New York and consolidated with the earlier-filed litigation for pretrial purposes. *See id.*, Dkt.5.

While Petitioner initially asserted various securities claims (some timely, others not), all but five of Petitioner's claims have since been resolved

via settlements that netted Petitioner far more than the corresponding class recoveries. *See, e.g.*, Press Release, *CalPERS Achieves $12.75M Recovery from Ernst & Young LLP* (May 5, 2014), http://bit.ly/2nb1z28. Petitioner's remaining claims all arise under Section 11 of the Securities Act, and all allege misrepresentations or omissions by various underwriters of Lehman securities in registration statements that were issued to the public between July 2007 and January 2008—*i.e.*, more than three years before its individual action was filed in California.

D. Petitioner Opts Out of the Class Action With Full Awareness That Its Individual Action Could Be Dismissed as Untimely

Petitioner filed its individual action before a class certification motion had been filed, and more than a year before it faced an opt-out decision vis-à-vis the Class Action settlement.[1] Nonetheless, Petitioner sought to benefit from the Class Action for tolling purposes. There was never any question that, standing alone, Petitioner's individual action under Section 11 was time-barred by Section 13's three-year statute of repose. Thus, the timeliness of Petitioner's separately filed Section 11 claims depended entirely

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[1] Petitioner's self-congratulatory press releases about its settlements with other defendants underscore that its strategy was designed to obtain a better recovery than would be provided by remaining in the Class Action. *See* Press Release, *supra* (boasting that Petitioner's settlement with Ernst & Young "is far larger than the recovery CalPERS would have obtained had it remained in the class action").

on the argument that, under *American Pipe*, the timely filing of the Class Action suspended Section 13's repose period as to Petitioner's Section 11 claims, and thus revived Petitioner's otherwise-moribund individual action. *See Cal. Pub. Emps.' Ret. Sys. v. Fuld*, No. 11-cv-01281-LAK (S.D.N.Y. Feb. 7, 2011), Dkt.1-1 at 52.

In early 2011, the district judge overseeing both the Class Action and Petitioner's transferred individual action held, in three separate opinions, that "statutes of repose, including the three-year period established by Section 13 of the Securities Act, are not tolled by the pendency of putative class actions." *In re Lehman Bros. Sec. & ERISA Litig.*, 800 F. Supp. 2d 477, 481 (S.D.N.Y. 2011); *accord In re Lehman Bros. Sec. & ERISA Litig.*, 799 F. Supp. 2d 258, 310 (S.D.N.Y. 2011); *In re IndyMac Mortg.-Backed Sec. Litig.*, 793 F. Supp. 2d 637, 642 (S.D.N.Y. 2011). Thus, at the time Petitioner formally opted out of the settlement of the Class Action in 2012, *see In re Lehman Bros.*, No. 09-md-02017-LAK-GWG (S.D.N.Y. May 2, 2012), Dkt.894, Petitioner knew to a certainty that the district court would dismiss its individual Section 11 suit as time-barred. Undeterred, Petitioner, a sophisticated investor and experienced litigant, was willing to gamble away the certain recovery it would have received in the Class Action settlement to pursue an even *greater* individual recovery, despite the risk that the appellate courts would affirm the district court's inevitable dismissal of Petitioner's individual action as untimely.

E. The District Court Dismisses Petitioner's Individual Suit as Time-Barred and the Second Circuit Affirms

Petitioner did not have to wait for long for its tactical gambit to be tested. Various defendants filed motions to dismiss Petitioner's individual Section 11 action as time-barred, and the district court granted one such motion on October 5, 2012. Consistent with its three 2011 decisions on this issue, the district court held that "*American Pipe* tolling does not apply to the statute of repose set forth in Section 13 of the Securities Act." Pet.App.11a. After the Second Circuit adopted the same view in *Police & Fire Retirement System of Detroit v. IndyMac MBS, Inc.* ("*IndyMac*"), 721 F.3d 95 (2d Cir. 2013), the district court promptly dismissed Petitioner's remaining Section 11 claims as untimely, Pet.App.7a.

The Second Circuit unanimously affirmed. Petitioner argued that *IndyMac* was not controlling because, unlike in *IndyMac*, the named plaintiffs in the Class Action here had standing to assert Petitioner's dismissed claims. The Second Circuit disagreed, explaining that the *IndyMac* rule "derived from two longstanding principles" that apply regardless of "whether the named plaintiffs have proper standing to assert claims on behalf of a class":

> First, if *American Pipe* is grounded in equity, its tolling rule cannot affect a legislatively enacted statute of repose.... Second, if *American Pipe* establishes a "legal" tolling principle grounded in Rule 23, to apply it to a statute of repose would violate the Rules Enabling Act by permitting a procedural

> rule to abridge the substantive rights created by statutes of repose.

Pet.App.3a-4a (citations omitted).

The Second Circuit also rejected Petitioner's alternative argument that because it was a member of the putative class before it opted out, its individual claims were timely "brought" for purposes of Section 13 without the need for tolling. As the court explained, "if it were true that a putative class member's claims were essentially 'filed' in the putative class complaint, there would be no need for *American Pipe* tolling at all; any putative class complaint would count as a legitimate 'filing' of all putative class members' claims within the limitations period." Pet.App.4a.

Finally, the court rejected Petitioner's argument that tolling of the three-year statute of repose was needed to protect its "due process" right to opt out of the Class Action. The court noted that "[t]he due process protections of Rule 23 are directed at preventing a putative class member from being bound by a judgment without her consent." Pet.App.5a. An absent class member's opt-out right "does not confer *extra* benefits to a plaintiff's individual action" or guarantee the existence of a viable, timely individual claim to opt into; instead, the opt-out right "merely ensures that each putative class member retains the ability to act independently of the class action if she so elects." Pet.App.5a.

F. This Court Grants Certiorari Only as to the First Question Presented

Petitioner sought this Court's review of two distinct questions: (1) Whether the filing of a

putative class action serves, under the *American Pipe* rule, to satisfy Section 13's three-year statute of repose with respect to putative class members' individual claims; and (2) whether, even if not, a member of a timely filed putative class action may bring an otherwise-untimely individual action asserting the same claims. Pet.i. As to the second question, Petitioner argued that "no tolling was required" at all because "the class member's action was timely commenced and maintained without interruption." Pet.26-27.

This Court had multiple petitions before it raising similar issues, with some petitions raising a single question and others presenting multiple questions. From those petitions, the Court granted certiorari in this case but expressly declined to address the second question. *See* Order List (Jan. 13, 2017) ("The petition for a writ of certiorari is granted *limited to Question 1 presented by the petition.*" (emphasis added)).

SUMMARY OF ARGUMENT

I. Section 13's text, two-tiered structure, and history make clear that whereas its one-year provision is a classic statute of limitations (which may be tolled in certain circumstances), its three-year provision is a "period of repose inconsistent with tolling." *Lampf*, 501 U.S. at 363. The language employed in this three-year provision is unequivocal: "*In no event*" may an action under Section 11 be brought more than three years after the offering of the security. 15 U.S.C. §77m (emphasis added). Moreover, given its placement alongside an extendable one-year limitations provision, the three-

year provision "can have no significance ... other than to impose an outside limit" on Section 11 suits. *Lampf*, 501 U.S. at 363. The legislative history underscores that Section 13's three-year outer limit was intended as a statute of repose.

Statutes of repose such as Section 13 are not subject to judicial extension or equitable tolling, "even in cases of extraordinary circumstances." *Waldburger*, 134 S. Ct. at 2183. Unlike statutes of limitations, statutes of repose serve the "distinct" purpose of establishing an absolute, "outer limit on the right to bring a civil action"—*i.e.*, "'a cutoff'" of liability that may not be judicially tolled or extended for any reason. *Id.* at 2182-83 (quoting *Lampf*, 501 U.S. at 363). Thus, unlike a statute of limitations, "'a repose period is fixed[,] and its expiration will not be delayed by estoppel or tolling.'" *Id.* at 2187.

American Pipe tolling does not apply to statutes of repose, like that included in Section 13. *American Pipe*'s "tolling rule," 414 U.S. at 555, is a rule of *equitable* tolling. This Court relied on traditional equitable considerations in reaching its holding, and has subsequently characterized *American Pipe* as an "equitable tolling" doctrine. *See, e.g.*, *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 & n.3 (1990). That should be the end of the matter, as "[s]tatutes of limitations, *but not statutes of repose*, are subject to equitable tolling." *Waldburger*, 134 S. Ct. at 2183 (emphasis added).

Conceding (as it must) that statutes of repose are not subject to equitable tolling, Petitioner attempts to reconceptualize *American Pipe* as a "legal" tolling rule that emanates from Rule 23. But that argument

suffers two fatal defects. First, Rule 23 says nothing at all about tolling, and Petitioner fails to identify anything in the text of Rule 23 that *American Pipe* was purportedly interpreting. This effort to reconceptualize *American Pipe* as something other than a species of equitable tolling is simply wishful thinking. Second, even if Petitioner were correct that *American Pipe* established a "legal" tolling rule based on Rule 23, that judicial gloss on a federal rule could not override Section 13's three-year statute of repose. This Court has made clear that statutes of repose confer *substantive* rights on defendants to be free from suit after a specified period. And under the Rules Enabling Act, courts may not apply the Federal Rules of Civil Procedure in a manner that would "abridge, enlarge or modify any substantive right." 28 U.S.C. §2072(b).

II. In implicit recognition that there are insurmountable doctrinal obstacles to extending *American Pipe* to statutes of repose, Petitioner argues in the alternative that its individual action was timely "wholly apart from the question of tolling." Pet.Br.31. This argument is procedurally improper and substantively unavailing.

Petitioner describes this argument as the "easiest path to reversal," Pet.Br.11, but that "path" faces a rather significant roadblock: namely, the fact that the Court *expressly declined to grant certiorari* on this issue. The certiorari petition presented two questions, but the Court limited its grant to the first question. Undeterred, Petitioner has now fully briefed both questions (leading with the non-granted question, no less) despite this Court's explicit

instructions to the contrary. The Court should not tolerate such brazen disregard for its clear instructions in the order granting certiorari. *Cf.* Order, *Visa, Inc. v. Osborn*, No. 15-961 (Nov. 17, 2016) (dismissing writ of certiorari as improvidently granted where "petitioners 'chose to rely on a different argument' in their merits briefing" from the question presented in the petition).

In all events, Petitioner's non-granted argument is meritless. Petitioner's theory requires accepting the rather counterintuitive premise that an individual suit filed in California for the sole purpose of asserting Petitioner's individual claims was, in fact, the same "action" as a putative class action filed by different plaintiffs in New York. That theory also faces the additional obstacle that Petitioner filed its individual California suit before the New York class action had even been certified. Thus, even if this Court were inclined to fashion a special rule deeming post-opt-out individual actions "brought" by the class plaintiffs (presumably in a case where the Court granted certiorari on that question), Petitioner—which filed its individual action after the statute of repose had run, but before certification—could not benefit from such a rule.

III. Petitioner's policy arguments are addressed to the wrong forum, but are unavailing in all events. Far from dealing "a grave blow" to the class-action system, Pet.Br.22, affirming the decision below would simply give effect to Congress' clear intent to foreclose new actions against underwriters and other potential securities defendants three years after the securities offering. *IndyMac* has been the law in the

Second Circuit (the home of the bulk of the Nation's securities litigation) for nearly four years, yet the explosion of "protective" filings Petitioner fears has not materialized. Nor would the incentives to file opt-out suits or protective filings disappear if the Court adopted Petitioner's proposed rule, as Petitioner and the institutional investors concede. The possibility of individual filings is an unavoidable byproduct of class litigation, not a consideration that should skew this Court's interpretation of a straightforward statute of repose.

Petitioner is likewise incorrect that its proposed rule is needed to further the purposes of Rule 23 and *American Pipe*. Under Petitioner's preferred regime, sophisticated and well-resourced institutional investors will have every incentive to treat class actions as little more than tools to leverage for their own individual benefit, as demonstrated by the facts of this case. If a statute of repose can be tolled indefinitely, then large institutional investors can free-ride off a class action for years, wait for the case to settle, and rather than stay in the class and fight for the optimal recovery for the entire class, can opt out at the last minute using the class settlement as a baseline to seek an even greater recovery through an individual suit. The inevitable losers of that regime would be the small investors Congress sought to protect through Rule 23 and the Private Securities Litigation Reform Act of 1995 ("PSLRA").

Finally, tolling of the three-year statute of repose is not remotely required by due process. The Due Process Clause protects individuals from being bound by a judgment in an action brought by strangers, and

the opt-out right fully protects that right. But nothing in the Due Process Clause or anything else guarantees class members that they will have a viable claim to opt into. Moreover, in those cases where a post-opt-out individual action would be barred by a statute of repose, a class member dissatisfied with a class settlement is not powerless. They retain the right to object to the settlement and push for a better resolution for the entire class, as opposed to pushing for a separate resolution that benefits only one well-heeled institutional litigant.

ARGUMENT

I. Section 13's Three-Year Bar Is A Statute Of Repose That May Not Be Extended Under Any Circumstances.

A. Section 13's Three-Year "In No Event" Bar Is Unequivocally a Statute of Repose.

1. Statutes of limitations and statutes of repose both "promote justice by preventing surprises through [plaintiffs'] revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Waldburger*, 134 S. Ct. at 2183. "Both types of statute," moreover, "can operate to bar a plaintiff's suit, and in each instance time is the controlling factor." *Id.* at 2182. But beyond those surface similarities, statutes of repose and statutes of limitations seek "to attain different purposes and objectives." *Id.*

Statutes of limitations are directed at plaintiffs. The "main thrust" of a statute of limitations—which traditionally begins to run when the plaintiff suffers

the relevant injury or discovers the relevant violation—"is to encourage the plaintiff to 'pursu[e] his rights diligently.'" *Id.* at 2183 (quoting *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1231-32 (2014)). Statutes of limitations are thus "customarily subject to 'equitable tolling,'" *Irwin*, 498 U.S. at 95; *Lozano*, 134 S. Ct. at 1231-32, when equitable considerations excuse a plaintiff from not taking action sooner. Indeed, refusing to suspend a limitations period where equity demands flexibility would frustrate the central purpose of the provision. *See Waldburger*, 134 S. Ct. at 2182-83.

Statutes of repose, by contrast, are "targeted at a different actor"—the defendant—and "embod[y] the idea that at some point a defendant should be able to put past events behind him." *Id.* at 2183. Accordingly, a statute of repose establishes an absolute "outer limit on the right to bring a civil action"—*i.e.*, "'a cutoff'" of liability that may not be extended for any reason. *Id.* at 2182-83 (quoting *Lampf*, 501 U.S. at 363). Statutes of repose thus are "not related to the accrual of any cause of action," do not focus on the plaintiff's equitable circumstances, and generally run "from the date of the last culpable act or omission of the defendant." *Id.* at 2182.

2. Section 13's text, structure, and history make clear that whereas its one-year provision is a statute of *limitations* (which courts may extend under certain circumstances), its three-year deadline is unambiguously a statute of *repose* (which may not be extended under any circumstances).

Section 13 contains two separate time limits that Congress enacted in back-to-back sentences. First:

> No action shall be maintained to enforce any liability created under [Section 11] ... unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence....

15 U.S.C. §77m. And second:

> In no event shall any such action be brought to enforce a liability created under [Section 11] ... more than three years after the security was bona fide offered to the public....

Id.

These two provisions work together to limit the actions that may be brought under Section 11. A Section 11 claim must satisfy both sentences to be timely, but the two provisions are quite different in terms of their text, purpose, and effect. The one-year provision is a classic statute of limitations. It focuses on the plaintiff, begins to run upon the plaintiff's discovery of the violation, and requires the plaintiff to exercise diligence in bringing her claims. *See Waldburger*, 134 S. Ct. at 2182 ("[A] statute of limitations creates 'a time limit ... based on' ... 'when the injury occurred or was discovered.'" (quoting *Black's Law Dictionary* 1546 (9th ed. 2009))). And it uses "fairly simple language" that is not inconsistent with tolling, thereby confirming Congress' intention not to depart from the background default rule allowing equitable tolling. *See United States v. Brockamp*, 519 U.S. 347, 350 (1997) ("Ordinarily limitations statutes use fairly simple language,

which one can often plausibly read as containing an implied 'equitable tolling' exception.").

Section 13's three-year bar, by contrast, is a classic statute of repose. *See Lampf*, 501 U.S. at 363 (three-year provision is a "period of repose inconsistent with tolling"). Rather than run from the date the plaintiff discovers the violation, the three-year bar "is measured ... from the date of the last culpable act or omission of the defendant." *Waldburger*, 134 S. Ct. at 2182. Rather than provide an incentive for a *plaintiff* to "'pursu[e] his rights diligently,'" *id.* at 2182-83 (quoting *Lozano*, 134 S. Ct. at 1231-32), the three-year bar places a finite limit on a *defendant's* exposure under Section 11. *See id.* ("Statutes of repose effect a legislative judgment that a defendant should 'be free from liability after the legislatively determined period of time.'" (quoting 54 C.J.S. *Limitations of Actions* §7 (2010))). And, unlike the one-year limitation in the first sentence of Section 13, the three-year bar in the second sentence employs unmistakably categorical language: "*In no event*" may an action be brought after the three-year cutoff. 15 U.S.C. §77m (emphasis added); *see Brockamp*, 519 U.S. at 350 (time bar that "sets forth its time limitations in unusually emphatic form" is inconsistent with tolling).

Petitioner is thus flatly wrong to suggest that Section 13's three-year bar has "remarkably similar text[]" to the one-year provision. Pet.Br.45. "No action ... unless" and "[i]n no event" are about as similar as "in the following circumstances" and "never." The only thing remarkable is the emphatic nature of the "[i]n no event" language. The first

sentence incorporates a discovery rule and a reasonable-diligence requirement, whereas the second sentence states unequivocally that "[i]n no event" may an action be brought more than three years after the offering. The former is classic limitations language; the latter is classic repose language.

3. Petitioner further contends that since the one-year provision and the three-year provision "are merely two sentences in the same statutory paragraph," both are statutes of limitations subject to judicial extension. Pet.Br.43-45. But the proper inference from the statute's structure is exactly the opposite. The fact that Congress adopted a two-tiered structure and grouped the two time bars together underscores that the latter, longer limit is a statute of repose.

Congress specifically placed the three-year bar *on top of* a one-year limitations period that itself contains an express discovery rule. *See* 15 U.S.C. §77m. That two-tiered structure is a familiar one, and one Congress routinely uses to signal its intention to establish *both* a shorter, tollable limitations period *and* a longer, absolute outer limit to liability. *See, e.g.*, *Gabelli v. SEC*, 133 S. Ct. 1216, 1224 (2013) ("[S]tatutes applying a discovery rule ... often couple that rule with an absolute provision for repose."); *see also* Br. for United States as Amicus Curiae Supporting Neither Party at 26, 27 n.6, *Credit Suisse Sec. (USA) LLC v. Simmonds*, No. 10-1261 ("two-part structure" is "evidence of Congress's intent" to establish "outer limits [that] define[] absolute periods of repose").

Take, for instance, 28 U.S.C. §1658(b). Section 1658(b) provides that private suits alleging fraud in violation of the Exchange Act "may be brought not later than the earlier of— (1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation." As this Court has explained, despite appearing in the same sentence as an express discovery rule (*i.e.*, Section 1658(b)(1)), Section 1658(b)(2) acts as an "*unqualified bar* on actions instituted '5 years after such violation,' giving defendants *total repose* after five years." *Merck & Co. v. Reynolds*, 559 U.S. 633, 650 (2010) (emphasis added) (citation omitted).

Moreover, since Section 13's one-year statute of limitations may be extended where equity demands, *see supra* pp.19-21, the three-year provision "can have no significance ... other than to impose an outside limit" on actions asserting Section 11 claims. *Lampf*, 501 U.S. at 363. Allowing Section 13's three-year bar to be extended, "even in cases of extraordinary circumstances," *Waldburger*, 134 S. Ct. at 2183, would thus render the provision largely superfluous. Congress did not include a second sentence in Section 13 for it to do no work.

Petitioner's reliance on Section 13's caption, "Limitation on actions," *see* Pet.Br.44-45, also misses the mark. This Court has frequently warned against placing undue weight on statutory captions and titles, and has underscored that the focus belongs on the operative language. *See, e.g., Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 211-12 (1998). That is particularly true here for two reasons. First, Petitioner itself points out that Congress has not

always been precise in labeling statutes of repose and limitations. Pet.Br.44; *accord Waldburger*, 134 S. Ct. at 2185 (citing 15 U.S.C. §78u-6(h)(1)(B)(iii)(I)(aa); 42 U.S.C. §2278).

Moreover, Section 13's caption does not say "statute of limitation," but rather refers to "[l]imitation[s] on actions," and there is no question that a statute of repose is an important limitation on actions. Thus, the caption is accurate if not particularly revealing. In all events, what matters, as this Court has underscored, is not the label Congress attaches to the provision in question, but what the provision actually says and does. *See Waldburger*, 134 S. Ct. at 2182-83, 2185-86. And on that score, Section 13's three-year bar is as clear as it gets: "In no event shall any ... action" under Section 11 be "brought ... more than three years after" the offering. 15 U.S.C. §77m. If that is not an "'absolute ... bar' on a defendant's temporal liability," *Waldburger*, 134 S. Ct. at 2183, then nothing is.[2]

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[2] In a halfhearted attempt to suggest that statutes of repose are just statutes of limitations by another name, Petitioner notes that "this Court has used the terms interchangeably." Pet.Br.45 n.8. But the only example Petitioner cites provides no support for Petitioner's position. Petitioner is correct that, in *Wallace v. Kato*, 549 U.S. 384, 391 (2007), the phrase "statute of limitations" appears "in the very next sentence" as the phrase "statute of repose." Pet.Br.45 n.8. But Petitioner omits the fact that, in *Wallace*, the Court referred to the hypothetical, subject-to-tolling provision as a "*supposed* statute of repose." 549 U.S. at 391 (emphasis added). The obvious import of that modifier was to signal that a *true* statute of repose would not be subject to tolling at all. *See Waldburger*, 134 S. Ct. at 2182-83, 2187.

4. Section 13's legislative history reinforces what its text and structure already make clear: Congress intended Section 13's three-year bar to be a "final limitation" after which an action alleging Section 11 claims "may not be brought at all." 78 Cong. Rec. 8198, 8200 (1934).

As originally enacted, the Securities Act employed a two-tiered structure with a two-year discovery period and a ten-year outer limit. In debating changes to the statute just one year after it was enacted, some representatives favored scrapping the two-tiered structure in favor of a single, five-year discovery rule. But Congress expressly rejected those proposals, and instead resolved to retain the two-tiered framework in order to "be just and fair to both sides." *Id.* at 8200. An absolute outer limit, in other words, was necessary to effectuate Congress' careful balancing of the interests of both plaintiffs (via Section 13's first sentence) and defendants (via the second sentence).

Congress also recognized that the original Act's long, ten-year period of exposure could "deter" qualified candidates from "serving on boards of directors," "disrupt normal business," and "facilitate false claims." *Norris v. Wirtz*, 818 F.2d 1329, 1332 (7th Cir. 1987), *overruled on other grounds by Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385 (7th Cir. 1990). Thus, to "give greater assurance to the honest officials of a corporation" and reduce the risk "that a director would be uncertain as to the settlement of his estate," Congress concluded that "a suit must be brought within 3 years," or it could not be brought at all. 78 Cong. Rec. 10,186 (1934).

Nothing in the record of Congress' deliberations in either 1933 or 1934 suggests in any way that Congress intended the newly shortened three-year limit to be subject to judicial extension. *See* James W. Beasley, Jr., Comm. on Fed. Regulation of Sec., *Report of the Task Force on Statute of Limitations for Implied Actions*, 41 Bus. Law. 645, 655 (1986) ("Congress did not intend equitable tolling to apply" to the three-year bar). Not a single "participant[] in the debate" over the 1934 amendments argued in favor of subjecting the repose period to tolling. Harold S. Bloomenthal, *Statutes of Limitations & The Securities Acts—Part I*, 7 Sec. & Fed. Corp. L. Rep. 17, 21 (1985). Rather, all agreed that Section 13's outer limit "was an absolute period." *Id.*

B. Statutes of Repose Are Not Subject to Equitable Tolling.

This Court has held in no uncertain terms that statutes of repose are not subject to judicial extension via estoppel or tolling. "Statutes of limitations, *but not statutes of repose*, are subject to equitable tolling." *Waldburger*, 134 S. Ct. at 2183 (emphasis added). Unlike a statute of limitations, which is "customarily subject to 'equitable tolling,'" *Irwin*, 498 U.S. at 95, "a repose period is fixed[,] and its expiration *will not be delayed by estoppel or tolling*." *Waldburger*, 134 S. Ct at 2187 (emphasis added). Statutes of repose remain absolute "even in cases of extraordinary circumstances." *Id.* at 2183. Indeed, even Petitioner concedes that statutes of repose are "not subject to equitable tolling." Pet.Br.8, 40.

It could hardly be otherwise. If courts suspended repose periods (even if only in truly sympathetic or

extraordinary cases), statutes of repose would fail to "reflect legislative decisions that as a matter of policy there should be a specific time beyond which a defendant should no longer be subjected to protracted liability." *Waldburger*, 134 S. Ct. at 2183. Worse still, if courts declined to respect Congress' decision to enact an absolute bar rather than an extendable limitations period—*i.e.*, if the kind of "[i]n no event" language employed by Congress here is not sufficient to mark a time period as a statute of repose immune from judicial extension—then it is hard to see how Congress would be able to maintain its undoubted authority to decide to grant defendants a substantive right to repose at all.

C. *American Pipe* Established an Equitable Tolling Rule That Does Not Apply to Section 13's Three-Year Statute of Repose.

1. In *American Pipe*, nonparty class members in an antitrust suit sought to intervene as individual plaintiffs after the district court denied class certification on numerosity grounds. 414 U.S. at 543-44. By the time the nonparty class members filed their motions to intervene, however, the relevant statute of limitations, Section 4B of the Clayton Act, had run. *Id.* at 544. The "question presented" in the case was thus "a limited one": Whether the filing of a putative class action "toll[ed] the running" of Section 4B's four-year limitations period as to "all purported members of the [putative] class who ma[d]e timely motions to intervene after the court has found the suit inappropriate for class action status." *Id.* at 540, 553. The Court answered that question in the

affirmative, but only after assuring itself that judicial extension of the legislative time limit was "consonant with the legislative scheme" at issue. *Id.* at 554-55, 558; *see also Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350 (1983) (extending holding of *American Pipe* to "'all asserted members of the class,' ... not just to intervenors"). Thus, nothing in *American Pipe* (or any other decision of this Court) suggests that this equitable tolling rule would apply to a statute of repose such as the absolute three-year deadline in Section 13, which "will not be tolled for any reason." *Waldburger*, 134 S. Ct. at 2183.

At the outset, there is no question that *American Pipe* established a rule of tolling. Indeed, the Court explicitly described its holding as "the *tolling rule* we establish here." *American Pipe*, 414 U.S. at 555 (emphasis added); *see also Crown, Cork*, 462 U.S. at 352 (describing *American Pipe* as a "tolling rule"); *id.* at 354 (Powell, J., concurring) (same).

Nor is there any serious question that *American Pipe* applied a rule of *equitable* tolling. "[I]n fashioning the [*American Pipe*] rule," the Court "took into account traditional equitable considerations." *Albano v. Shea Homes Ltd. P'ship*, 634 F.3d 524, 537 (9th Cir. 2011). For instance, the Court relied on the fact that class certification had been denied for lack of numerosity, not "for reasons of bad faith or frivolity." *American Pipe*, 414 U.S. at 553. And in noting that its decision broke no "new ground," *id.* at 558, the Court cited "cases where the plaintiff ha[d] refrained from commencing suit during the period of limitation because of inducement by the defendant ... or because of fraudulent concealment," *id.* at 559

(citing *Glus v. Brooklyn E. Terminal*, 359 U.S. 231 (1959); *Holmberg v. Armbrecht*, 327 U.S. 392 (1946)). Those paradigmatically equitable considerations were central to the Court's holding.

Indeed, the "tolling rule" applied in *American Pipe* could not have been anything *other than* a rule of equitable tolling. To be sure, sometimes Congress mandates that courts pause limitations periods in certain enumerated circumstances. *See, e.g.*, 28 U.S.C. §2244(d)(2) ("The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."); *see also Pace v. DiGuglielmo*, 544 U.S. 408, 417-18 (2005). But such "statutory tolling" was not at issue in *American Pipe*. *See* 414 U.S. at 541 nn.2-3. Where a statute lacks an express command to pause the running of a deadline, a court's only basis for extension is equitable tolling—and only then if it is consistent with the text and purpose of the statute, as *American Pipe* itself recognized. *See id.* at 558; *accord Lozano*, 134 S. Ct. at 1231-32.

It should therefore come as no surprise that this Court has routinely characterized *American Pipe* as applying a rule of equitable tolling. *See, e.g.*, *Young v. United States*, 535 U.S. 43, 49 (2002) (citing *American Pipe* as an example of the "hornbook" principle that limitations periods "are customarily subject to equitable tolling"); *Irwin*, 498 U.S. at 96 & n.3 (characterizing *American Pipe* as a case in which this Court has "allowed equitable tolling"); *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S.

322, 338 n* (1978) (Burger, C.J., concurring) (citing *American Pipe* as an example of "[t]he authority of a federal court ... to toll a statute of limitations on equitable grounds").

2. If this Court concludes, as it should, that Section 13's three-year bar is a statute of repose and that *American Pipe* applied an equitable tolling rule, then that is the end of the case.

This Court has already held that statutes of repose are not subject to equitable tolling. As discussed above, "a repose period is fixed[,] and its expiration will not be delayed by estoppel or tolling." *Waldburger*, 134 S. Ct. at 2187; *see id.* at 2183 ("[s]tatutes of limitations, but not statutes of repose, are subject to equitable tolling"). And that is particularly true in the context of Section 13, which includes the unusually unequivocal language that "[i]n no event" may a Section 11 action be brought more than three years after the securities offering. 15 U.S.C. §77m. Unsurprisingly, in the three years since this Court decided *Waldburger*, which reaffirmed that one of the distinguishing features between statutes of limitations and statutes of repose is that the latter are not subject to equitable tolling, every federal circuit court to consider the issue has concluded that *American Pipe* does not apply to statutes of repose such as Section 13.[3]

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[3] *See, e.g.*, Pet.App.1a-6a; *Dusek v. JPMorgan Chase & Co.*, 832 F.3d 1243, 1247-49 (11th Cir. 2016), *petition for cert. filed*, No. 16-389 (Sept. 26, 2016); *SRM Glob. Master Fund Ltd. P'ship v. Bear Stearns Cos. LLC*, 829 F.3d 173, 176-77 (2d Cir. 2016), *petition for cert. filed*, No. 16-372 (Sept. 22, 2016); *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821

D. Petitioner's Argument That *American Pipe* Established a "Legal" Tolling Rule Fails.

1. Conceding that statutes of repose are "not subject to equitable tolling," Pet.Br.8, 40, Petitioner argues that *American Pipe*'s "tolling rule" is "either *sui generis*, or it is a form of legal tolling because it sets forth an 'interpretation' of Rule 23." Pet.Br.47. Petitioner does not further explicate what it means by a "*sui generis*" tolling rule, nor does it explain how courts would have authority to create "*sui generis*" exceptions to statutory deadlines. Certainly, that label is no substitute for a coherent theory of how a judge-made tolling rule could trump a congressional statute of repose, when this Court has already made clear that a defining feature of statutes of repose is that, unlike statutes of limitation, they are not subject to tolling or estoppel. *See Credit Suisse Sec. (USA) LLC v. Simmonds*, 566 U.S. 221, 226 n.6 (2012) ("[t]he label attached to [a tolling] rule does not matter").

Petitioner's contention that *American Pipe* reflects a "legal" tolling rule is nearly as opaque and question-begging, and is in all events unavailing. Presumably the "legal" tolling label reflects the notion that the rule flows from some source of law other than the courts' general equitable powers.[4] But

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F.3d 780, 793-94 (6th Cir. 2016); *DeKalb Cty. Pension Fund v. Transocean Ltd.*, 817 F.3d 393, 413-14 (2d Cir. 2016), *petition for cert. filed*, No. 16-206 (Aug. 12, 2016).

[4] Although some lower courts have described *American Pipe* as applying "legal tolling," this Court has expressly declined to join them in that characterization—and indeed, has never

there are only two candidates for the source of this legal rule and both have fatal problems. The rule cannot flow from Section 13 itself because, far from authorizing any tolling, that provision positively forecloses tolling with its "[i]n no event" language.

Petitioner thus must think this "legal" rule emanates from Rule 23, but that argument faces multiple insurmountable hurdles. First, Rule 23 says nothing about tolling. Rule 23 sets forth an intricate lattice of rules governing multiple aspects of class action practice, but says nary a word about tolling—let alone about whether (or when) the pendency of a putative class action may affect a statutory time limit for commencing some *other* individual action. *Cf. Walker v. Armco Steel Corp.*, 446 U.S. 740, 750-51 (1980) (rejecting argument that Rule 3 governed tolling of state limitations period because "[t]here is no indication that the Rule was intended to toll a state statute of limitations"). It would be implausible, to say the least, to suggest that *American Pipe*'s tolling rule was premised on a procedural rule that says exactly nothing about tolling or time limits.

Second, this Court has already rejected the argument that *American Pipe* is an emanation from Rule 23 that displaces contrary law. *See Chardon v. Fumero Soto*, 462 U.S. 650, 659-61 (1983). While the dissent in *Chardon* embraced that view, *see id.* at 664 (Rehnquist, J., dissenting), the majority rejected it and confirmed that the tolling rule in *American Pipe*

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embraced a distinction between equitable tolling and "legal"-but-still-judge-made tolling. *See Credit Suisse*, 566 U.S. at 226 n.6.

flowed from the limitations provision there at issue. *See id.* at 659, 661 (majority opinion) (the "particular federal statute" at issue "provided the basis for" tolling in *American Pipe*).

Reconceptualizing *American Pipe* as an emanation from Rule 23 rather than an application of equitable tolling principles to a congressional time limit would also create serious anomalies for putative class actions filed in state court. As long as *American Pipe* is a product of the equitable powers of federal courts as applied to federal statutes of limitations (and not repose), it makes little difference whether the putative class action said to toll an otherwise untimely individual federal-court action proceeded in state court or federal court. Either way, it is federal law that is doing the tolling. But if *American Pipe* is reconceptualized as emanating from Rule 23, then it is hard to see how a putative class action filed in state court could toll a congressional statute, whether of repose or limitation. Whatever the problems with a federal rule of procedure overriding a federal substantive statute, *see infra*, the Supremacy Clause would not allow a state rule of procedure to trump any federal statute, whether procedural or substantive. And it is clear that Rule 23 does not apply of its own force in state court.

Thus, the only valid way to understand *American Pipe* is as an application of equitable principles to the particular federal time limit at issue. Because the time limit at issue in *American Pipe* was a statute of limitations, equitable tolling principles applied. Because the time limit at issue

here is a statute of repose, equitable tolling is inapplicable.

2. Construing *American Pipe* as a "legal" tolling principle based on Rule 23 that would trump Section 13's three-year statute of repose faces an equally fatal obstacle in the Rules Enabling Act.

This Court has made clear that statutes of repose give defendants substantive rights to repose. Whereas statutes of limitations govern a plaintiff's *procedural* ability to sue, statutes of repose confer *substantive* rights "to be free from liability after a legislatively determined period." *Barnett v. DynCorp Int'l, L.L.C.*, 831 F.3d 296, 307 (5th Cir. 2016); *see also Waldburger*, 134 S. Ct. at 2183 ("Like a discharge in bankruptcy, a statute of repose can be said to provide a fresh start or freedom from liability."); *IndyMac*, 721 F.3d at 106 ("[I]n contrast to statutes of limitations, statutes of repose 'create[] a *substantive* right in those protected to be free from liability after a legislatively-determined period of time.'"); *Goad v. Celotex Corp.*, 831 F.2d 508, 511 (4th Cir. 1987) ("Statutes of repose are meant to be 'a substantive definition of rights as distinguished from a procedural limitation on the remedy used to enforce rights.'").[5]

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[5] The United States has likewise recognized many times that a statute of repose is "a substantive definition of rights rather than a procedural limitation on the remedy used to enforce rights." Br. for United States as Amicus Curiae Supporting Petitioner at 27, *CTS Corp. v. Waldburger*, No. 13-339; *see also id.* at 14 (noting the "recognized line between statutes of limitations, which are considered procedural, and statutes of repose, which are substantive limits on liability"); Br. for United States in Opposition at 7-8, *Lyon v. Augusta S.P.A.*, No. 01-569

Under this Court's precedents and the Rules Enabling Act, however, courts may not "interpret[] Rule 23 to 'abridge, enlarge or modify any substantive right.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) (quoting 28 U.S.C. §2072(b)); *see also Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046 (2016) (judicial applications of Rule 23 must themselves conform to the limits of the Rules Enabling Act). Applying a tolling rule emanating from Rule 23 to allow a plaintiff to bring a suit that otherwise would have been barred by a statute of repose would unquestionably "abridge ... or modify" the defendant's *substantive* right to repose.

Unlike in *American Pipe*, the substantive/procedural divide of the Rules Enabling Act cannot be avoided by concluding that tolling "is consonant with the legislative scheme." 414 U.S. at 558. Here, the legislative scheme provides a statute of repose incompatible with tolling. *See supra* pp.19-23. Petitioner's contention that "'[w]hat matters is what the Rule itself regulates,'" Pet.Br.49 (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (plurality opinion)), is likewise beside the point. No one doubts that Rule 23 "really regulates procedure." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941). But Rule 23 says nothing about limitations or repose periods. Thus, the relevant question is not what Rule 23 *itself* regulates, but rather what effect Petitioner's preferred interpretation of *American Pipe* and Rule 23 would

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(A "statute of repose, unlike [a] statute of limitations, creates [a] substantive right to be free from liability and therefore is not susceptible to tolling.").

have on defendants' substantive rights. The answer to that question is clear: It would impermissibly trump the defendant's substantive right to repose.

Thus, reconceptualizing *American Pipe* as a "legal" rule that trumps substantive rights to repose would reconceptualize it into a Rules Enabling Act violation. It would also create serious separation-of-powers concerns, as the Rules Enabling Act helps ensure that judicially promulgated rules do not interfere with Congress' exclusive authority to legislate. *See, e.g.*, *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, No. 15-927, Slip Op. 4 (U.S. 2017) (cautioning against "giv[ing] judges a 'legislation-overriding' role that is beyond the Judicary's power" (quoting *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1974 (2014))). It is one thing for courts to promulgate rules that reflect courts' authority to fashion rules of procedure to govern their own proceedings. It is quite another matter for courts to promulgate rules that would override congressionally-conferred substantive rights of repose.

3. Petitioner asserts that Respondents have no "'substantive right' to force plaintiffs to litigate their Section 11 claims through a class representative." Pet.Br.49. That is a red herring. No one forced Petitioner—a $300 billion investment fund and sophisticated litigant—to wait more than three years after the debt offerings at issue to file its individual suit. But once Petitioner chose to wait that long to file, it would inevitably confront Respondents' substantive right to repose. And relying on a timely-filed putative class action and Rule 23 to override

that substantive right squarely implicates the Rules Enabling Act.

Petitioner further contends that because Section 13 "says nothing about creating or extinguishing substantive rights," the Rules Enabling Act poses no bar to tolling the three-year repose period. Pet.Br.50. But this Court has made clear that statutes of repose confer substantive rights on defendants to be free from suit. *See supra* p.34. Thus, a statutory time limit that made clear not only that it was a statute of repose but also that it created a substantive right to repose would be redundant. This Court does not demand redundancy or any magic words. Instead, what matters is whether Section 13 is a statute of repose, *i.e.*, "whether Congress intended that 'the right shall be enforceable in any event after the prescribed time.'" *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 416 (1998). Section 13's answer to that question could not be clearer: "*In no event*" may an action under Section 11 be brought more than three years after the securities offering. 15 U.S.C. §77m (emphasis added).

Finally, Petitioner is wrong to suggest (at 50-51) that this Court rejected a similar Rules Enabling Act argument in *American Pipe*. The statutory time limit at issue in *American Pipe* in no way "parallels" Section 13's statute of repose. *Contra* Pet.Br.51. As the Court noted, Section 4B of the Clayton Act "'is strictly a procedural limitation and has nothing to do with substance.'" *American Pipe*, 414 U.S. at 558 n.29 (quoting 101 Cong. Rec. 5131 (1955)). Indeed, the Congress that enacted Section 4B specifically

intended that the provision "'in no way affect the substantive rights of individual litigants.'" *Id.*

Moreover, there was never any doubt that the statutory time limit at issue in *American Pipe* could be tolled under certain circumstances, which is antithetical to a statute of repose. *See Waldburger*, 134 S. Ct. at 2183, 2187. The Clayton Act *itself* expressly provided for tolling in the event of a government antitrust action—and, indeed, the limitations period in that case had already been tolled twice under that provision. *See American Pipe*, 414 U.S. at 560-61. Section 4B thus did not create the kind of "fixed" substantive period of repose not subject to "'delay[] by estoppel or tolling,'" *Waldburger*, 134 S. Ct. at 2187, provided by Section 13. Thus, there was no Rules Enabling Act problem there. But since Section 13 is a statute of repose, tolling—whether labeled equitable, legal, or *sui generis*—is not permitted by, *inter alia*, the Rules Enabling Act.

II. Petitioner's Argument That Its Individual Action Is Timely "Regardless Of Tolling" Is Outside The Scope Of The Question Presented And Wrong On The Merits.

In implicit recognition that no amount of relabeling or reconceptualization will allow a "tolling rule" to override a statute of repose, Petitioner offers the alternative theory that this Court can reverse the judgment below "regardless of tolling." Pet.Br.11-12, 30-38. According to Petitioner, "wholly apart from the question of tolling," the filing of a timely class action complaint "commences" the action for *all* members of the putative class, even those who later

seek to bring separate individual actions. Pet.Br.31. Petitioner thus contends that "the filing of the Class Action Complaint timely 'brought' the claims of every class member, including CalPERS." Pet.Br.31-32. That alternative theory is outside the bounds of what this Court agreed to consider in granting certiorari and deeply flawed.

A. The Court Expressly Declined To Grant Certiorari on This Issue.

Petitioner seems not to understand the meaning of "limited to Question 1." The petition for certiorari presented two distinct questions: (1) "Does the filing of a putative class action serve, under the *American Pipe* rule, to satisfy" Section 13's three-year statute of repose with respect to putative class members' individual claims; and (2) whether, even if not, a member of a timely filed putative class action may bring an individual action asserting the same claims. Pet.i. In support of the second question presented (hereinafter "QP2"), Petitioner argued that its individual suit filed in California was not a "new action" under Section 13, but rather merely involved Petitioner "taking over the prosecution" of an existing claim from the putative class representative. Pet.27. Because Petitioner's claims were supposedly "presented by a class representative within Section 13's time limits," Petitioner asserted that its separate suit was "timely even without tolling." Pet.28.

This Court granted certiorari, but *expressly limited its grant* "to Question 1 presented by the petition." Order List (Jan. 13, 2017). That was no accident, as the Court was considering multiple petitions, some raising one issue and others raising

two. Nonetheless, Section II of Petitioner's merits brief, *see* Pet.Br.11-12, 30-38, now raises the precise argument on which this Court declined to grant certiorari. For example, quoting the same unpublished district court decision cited in the QP2-portion of the petition, Petitioner argues that "'when an unnamed, putative class member later files its own individual claim, it is not instituting a new action subject to the statute of limitations and statute of repose; it is simply taking over the prosecution of its individual claim from the putative class representative.'" Pet.Br.30 (quoting *In re BP p.l.c. Sec. Litig.*, No. 4:13-cv-1393, 2014 WL 4923749 (S.D. Tex. Sept. 30, 2014)); *compare* Pet.27 (same). And just as it argued in the petition in support of the non-granted QP2, Petitioner contends here that "the timely filing of the Class Action timely 'brought' CalPERS's claims." Pet.Br.32; *compare* Pet.28 ("petitioner's claims were presented by a class representative within Section 13's time limits").

Amazingly, Petitioner not only raises the non-granted QP2 as a standalone argument and promotes it as the "easiest path to reversal," Pet.Br.11, but also resurfaces the QP2 argument in other parts of its brief. For instance, Petitioner argues that a statute of repose should not foreclose tolling where "the plaintiff's claim *was already timely filed* before the expiration of the repose period" via a class action. Pet.Br.41; *see also* Pet.Br.40 (statute of repose "relates only to *new* assertions of liability"). And Petitioner attempts to distinguish *Lampf* on the ground that "in this case, the 'litigation'—*i.e.*, the Class Action—was 'commenced ... within three years' of the violation." Pet.Br.46. All of those arguments

are just variations on Petitioner's non-granted QP2 theory that its Section 11 claims were "brought" or "commenced" within three years of the offering because Petitioner was a member of a timely-filed putative class action bringing similar claims.

This Court should not reward such a brazen end-run around its explicit decision to limit the grant of certiorari. Petitioner's effort to disregard this Court's direction and to forge ahead and brief QP2 leaves Respondents little choice but to respond to extraneous arguments, and detracts attention and briefing space from the one question this Court decided to hear. This Court has had little patience for comparable tactics, *cf.* Order, *Visa, Inc. v. Osborn*, No. 15-961 (Nov. 17, 2016), and should expressly disregard the arguments raised at pp. 11-12, 29-38, 40-41, and 46 of Petitioner's brief.

B. Petitioner's Alternative Theory Fails on the Merits.

1. Even if the Court were to consider the merits of Petitioner's non-granted QP2 argument, it should make short work of it, as it relies on an implausible reading of Section 13. According to Petitioner, when it filed a new action in California more than three years after the relevant securities were offered to the public, its Section 11 claims were still timely because similar claims were filed in New York by different lawyers in a putative class action. This is so, we are told, because, wholly apart from any principle of tolling, the Section 11 "claims" were "*already timely filed*" the moment the putative class action was filed. Pet.Br.41. But Section 13 does not speak of "claims"; it speaks of "action[s]":

> No *action* shall be maintained to enforce any liability created under [Section 11] unless brought within one year after the discovery of the untrue statement or the omission.... In no event shall any such *action* be brought ... more than three years after the security was bona fide offered to the public....

15 U.S.C. §77m (emphasis added).

An "action" is "[a] civil or criminal judicial proceeding." *Black's Law Dictionary* 12 (3d pocket ed. 2006); *compare id.* at 105 (defining "claim" to mean, *inter alia*, "[t]he part of a complaint in a civil *action* specifying what relief the plaintiff asks of the court" (emphasis added)). Regardless of whether Petitioner's *claims* mirror those asserted in the Class Action, Petitioner cannot seriously dispute that its separate individual *action—i.e.*, the action whose timeliness is at issue in this Court—was filed more than three years after the offerings at issue.[6] And the class action in New York and the individual action in California are self-evidently different actions. Indeed, no reasonable user of the English language would say that an individual suit filed in California was the same "action" as a putative class action being litigated by different plaintiffs in New York.

According to Petitioner, the Court need not be concerned about interpreting "action" to mean "claim" because "in this context, the word 'action'

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[6] As Rule 3 makes clear, "[a] civil action is commenced by filing a complaint with the court," not by presenting claims brought by different plaintiffs in a different forum.

means a 'cause of action,' which refers to a claim for relief, and not the complaint as a document." Pet.Br.35. But it is no less verboten for a court to add words to a statute (expanding "action" to "cause of action") than it is to change them (morphing "action" into "claim"). "Action" in Section 13 means neither claim nor cause of action, but action.

Even setting aside that considerable problem, Petitioner's argument still fails. A simple perusal of the Securities Act reveals that Congress knew the difference between "claims" (or "causes of action") on the one hand and "actions" on the other. The Securities Act uses the term "claim" dozens of times, including more than twenty times in 15 U.S.C. §77kkk alone. Some sections of the Act use the terms "action" and "claim" *in the same subparagraph*.[7] And Section 13 itself uses a synonym for claim—"a liability created under [Section 11]"—in contradistinction to an "action." Section 13 could just as easily refer to an action raising a claim under Section 11. Petitioner thus cannot plausibly contend that the word "action" in Section 13 is synonymous with "claim."

Petitioner asserts (at 35-36) that the "most instructive case" on its QP2 argument is *Jones v. Bock*, 549 U.S. 199 (2007), which addressed the administrative-exhaustion requirement under the

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[7] *See, e.g.*, 15 U.S.C. §77z-1(a)(3)(A)(ii) ("If more than one action on behalf of a class asserting substantially the same claim or claims arising under this subchapter is filed, only the plaintiff or plaintiffs in the first filed action shall be required to cause notice to be published in accordance with clause (i)."); *id.* §77z-1(a)(3)(A)(i)(I).

Prison Litigation Reform Act ("PLRA"). But *Jones* stands only for the unremarkable proposition that when a single action includes some exhausted claims and some unexhausted claims, the court should dismiss the latter and allow the former to proceed. In short, "if a complaint contains both good and bad claims, the court proceeds with the good and leaves the bad." *Id.* at 221.

Nothing in the decision below is inconsistent with *Jones*. Indeed, as noted above, Petitioner was *allowed* to proceed with its "good"/timely claims; those claims have since been settled. *See supra* pp.8-9; Pet.Br.6 n.2. But nothing in *Jones* suggests that a Section 11 plaintiff may be excused from complying with Section 13's three-year statute of repose merely because it brought other timely claims. That would be akin to the petitioners in *Jones* arguing that they could be excused from the PLRA's exhaustion requirement for the non-exhausted claims because of the presence of an exhausted claim—an argument that plainly would have been a non-starter.

2. Petitioner's alternative QP2 argument suffers the additional defect that Petitioner was never even a party to the timely New York action. At the time Petitioner filed its individual action in California, no class had been certified in the New York action. *See supra* pp.8-9. As this Court recently explained, the notion "that a nonnamed class member is a party to the class-action litigation before the class is certified" is "surely erroneous." *Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011); *accord Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1349 (2013); *see also Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct.

1523, 1530 (2013) (class action does not "acquire[] an independent legal status" until it is certified).

Petitioner's non-granted QP2 theory can be rejected for this reason alone: Unless and until a class certification order is issued, non-named class members are not parties to the class action *at all* and cannot be deemed to have "brought" or "commenced" any claims for purposes of determining whether a later-filed individual action is timely. At the point that Petitioner filed its California individual action, it was a stranger to the New York action. The fact that the New York action involved a putative class action that would include Petitioner if certified might be enough to trigger *American Pipe* tolling (where that doctrine applies), but it is not remotely enough to deem Petitioner's Section 11 claims as having been actually "brought" in that separate action.

3. Finally, Petitioner contends that allowing an individual action to be brought after the statute of repose has expired will not make a dime's worth of difference for defendants because "the number and identity of claims" does not change when a plaintiff "t[akes] over its individual piece of the litigation by filing its own complaint and opting out of the Class Action." Pet.Br.34; *see also* Pet.Br.40 (individual action is not a "*new* assertion[] of liability"). That argument simply disregards the reality of how class actions are litigated.

The entire purpose of a separate individual action is to allow the opt-out plaintiff to pursue a *different* strategy from the class, which almost always involves seeking *more money* than the plaintiff believes it would receive by staying in the

class. Indeed, as noted above, Petitioner routinely boasts that its opt-out suits have yielded much greater recoveries than it would have obtained had it remained in the underlying class actions. *See supra* pp.8-9. It blinks reality to suggest that a class action *plus* an individual suit by a putative class member (especially one as sophisticated and deep-pocketed as Petitioner) is no different in practical effect from the class action standing alone. More broadly, repose allows a defendant to know not just the amount of potential monetary exposure, but how many suits it will face and in how many fora. Exposing a defendant to the possibility of multiple individual suits in multiple fora is hardly repose.

In sum, despite Petitioner's suggestions to the contrary, allowing separate actions to be brought after the statute of repose has expired would result in the precise uncertainty and expanded liability that statutes of repose are designed to prevent. *See Waldburger*, 134 S. Ct. at 2183 ("Like a discharge in bankruptcy, a statute of repose can be said to provide a fresh start or freedom from liability.").

III. Petitioner's Policy Arguments Do Not Support Disregarding The Three-Year Statute Of Repose.

Perhaps sensing the clarity with which Section 13 sets forth a non-tollable statute of repose, Petitioner opens its brief with a paean to policy concerns. *See* Pet.Br.15-25 (arguing that tolling is needed to protect "the interests this Court sought to protect in *American Pipe*"). Even if meritorious, such concerns could not trump Section 13's plain text, structure, and history, or overcome Congress' policy

choice to provide true repose "even in cases of extraordinary circumstances." *Waldburger*, 134 S. Ct. at 2182-83. But Petitioner's policy arguments are wide of the mark in all events.

A. Petitioner's Parade of Horribles Is Illusory.

According to Petitioner, affirming the decision below would "deal[] a grave blow" to the federal judiciary and class-action litigants, "produc[ing] a logistical and risk management nightmare for courts and defendants." Pet.Br.22. In particular, Petitioner warns of a flood of "protective" filings to preserve the timeliness of any potential individual claims. That sky-will-fall prediction might have had some credence back when this Court first considered *IndyMac*. But *IndyMac* has now been the law of the Second Circuit (where the bulk of securities class actions are filed) since 2013, yet the sky has not fallen and the predicted flood is but a trickle.

As of November 2016, only *three* out of 189 securities class actions (1.59%) filed in the Second Circuit since *IndyMac* had generated *any* opt-out litigation. *See* Filings Database, Securities Class Action Clearinghouse, Stanford Law School, http://stanford.io/1CscqnJ. That rate is *lower* than in the years preceding the *IndyMac* decision. *See* Amir Rozen et al., Cornerstone Research, *Opt-Out Cases in Securities Class Action Settlements* 2 (2013) ("*Opt-Outs*") (between 1996 and 2011, approximately 3% of securities class-action settlements produced opt-out litigation). Moreover, a recent update to a study of opt-out cases from securities class actions, which includes actions filed after *IndyMac*, "found no

discernible increase in the preponderance of opt-outs over time." Amir Rozen et al., Cornerstone Research, *Opt-Out Cases in Securities Class Action Settlements, 2012–2014 Update* 2 (2016).

All Petitioner can muster to support its contrary prognostication is a single case, *In re Petrobras Securities Litigation*, 312 F.R.D. 354 (S.D.N.Y. 2016). *See* Pet.Br.23-24. *Petrobras*, however, only underscores that opt-out litigation typically has little or nothing to do with *American Pipe* or *IndyMac*. The defendant, Brazil's state-run energy company Petróleo Brasileiro S.A., or "Petrobras," was at the relevant time one of the largest companies in the world—larger than Boeing, Microsoft, or Procter & Gamble. While *Petrobras* has generated a significant number of opt-outs, those appear to be driven by the perceived value of the opt-out claims rather than a desire to preserve the timeliness of those claims.

By and large, the parties that have opted out of the *Petrobras* class are sophisticated institutional investors that believe they can achieve a greater recovery by going it alone. That is nothing new, and hardly a phenomenon limited to securities class actions or class actions involving claims subject to a statute of repose. *See Opt-Outs* at 1 ("The most frequently observed opt-out plaintiffs are pension funds, followed by other types of asset management companies."). Wholly apart from any concern about tolling, parties with the most skin in the game often conclude that they can do better through an individual action brought by their own counsel than by riding along as passive members of the class. *See In re Petrobras Sec. Litig.*, 312 F.R.D. at 362 ("[I]t is

not uncommon for large institutions to opt out of class actions simply so that they can improve their bargaining position if, as usually occurs, settlement discussions begin.").

Indeed, Petitioner—which oversees nearly $300 billion in assets—is a prime example of this type of player. Well before *IndyMac*, Petitioner opted out of the AOL/Time Warner securities litigation based on its conclusion that, by going it alone, it could recover approximately *seventeen times* what it would have recovered as part of the class. *See* Press Release, *CalPERS Recovers $117.7 Million in Time Warner Lawsuit* (Mar. 14, 2007), http://bit.ly/2ovCJXe. It would thus be deeply misleading to suggest that the opt-outs in *Petrobras* are attributable to *American Pipe* or *IndyMac* rather than to the normal litigation incentives facing large institutional investors.

Moreover, while large institutional litigants have incentives to opt out of certain cases with or without the *IndyMac* rule, there is little risk that the vast bulk of class members will file protective individual suits. Indeed, a major justification for class action litigation is that it provides relief to class members that have no incentive to litigate on their own. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997); *American Pipe*, 414 U.S. at 551-52.[8]

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[8] To the extent that the rule of *IndyMac* might change the timing, but not the volume, of opt-out suits, that phenomenon could potentially be helpful. If those individual suits are simply put on hold until the class action settles, then their earlier filing will make little difference. But incentivizing early opt-out decisions will benefit class members and defendants alike, as both sides will be able to litigate (and, perhaps, negotiate) with

In all events, Petitioner's proposed rule would hardly eliminate the incentive for sophisticated litigants to file protective individual actions, as Petitioner and the institutional investors concede. *See* Pet.Br.23; Institutional Investors Br. 20. Whenever there are questions about whether a group of potential litigants comes within the class definition or whether their claims overlap with those raised by the class representatives, there will be incentives for sophisticated litigants to file protective individual actions to avoid being denied the benefits of *American Pipe* tolling. *See, e.g., In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.*, 860 F. Supp. 2d 1062, 1067-70 (C.D. Cal. 2012) (holding that *American Pipe* tolling does not apply to investors who purchased different tranches of securities than named class plaintiffs). The possibility of some duplicative, protective individual filings is an unavoidable byproduct of class litigation more generally rather than some unique flaw of the *IndyMac* rule.

In sum, despite Petitioner's foreboding prophecies about a flood of litigation, there is zero empirical evidence suggesting that protective opt-out filings have increased in the wake of *IndyMac*. And large sophisticated investors such as Petitioner will continue to have incentives to file opt-out suits for reasons that have nothing to do with tolling or

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greater certainty as to where the parties stand. Moreover, if some of the individual suits yield early individual settlements that give a benchmark to judge the fairness of the class settlement, the individual suits will aid the district court's difficult task under Rule 23(e) and potentially benefit the class.

statutes of repose. Petitioner's policy concerns provide no basis to depart from the clear text of Section 13.[9]

B. Petitioner's Preferred Rule Would Undermine, Not Further, the Purposes of Rule 23 and the PSLRA.

Petitioner, one of the largest investment funds in the world, also asserts that applying Section 13 to individual opt-out actions will "disproportionately harm smaller investors who lack the awareness or wherewithal to file protective individual complaints—*i.e.*, the investors who most need the protection offered by the federal securities laws." Pet.Br.25. To the contrary, while Petitioner's proposed rule might provide some marginal benefits to large institutional investors that want to keep their options open, it would have negative effects for both smaller investors and the class-action system more generally.

One of the central purposes of Rule 23 is to provide parties that individually may have relatively small potential recoveries (and thus relatively little incentive to file suit) a meaningful opportunity to

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[9] One group of amici offers an "empirical" analysis that purportedly shows the "efficiency toll" of the *IndyMac* rule. *See* Br. for Civil Procedure and Securities Law Professors. That brief includes an elaborate analysis of how long it takes to certify classes. *Id.* at 5-15. But, like Petitioner, those amici point to zero evidence suggesting that protective opt-out filings have *actually increased* in the Second Circuit or any of the other circuits that have adopted the *IndyMac* rule. At most, those amici quibble with the research showing that opt-out suits have *not* increased in the wake of *IndyMac*.

obtain redress for their injuries. *See Amchem*, 521 U.S. at 617; *American Pipe*, 414 U.S. at 551-52. A further aim of Rule 23 is to bring larger, more sophisticated parties together with smaller ones on the theory that a rising tide will lift all boats. Rule 23 "both permits and encourages class members to rely on the named plaintiffs to press their claims," *Crown, Cork*, 462 U.S. at 352-53, and smaller investors will inevitably do better if they can rely on the resources and know-how of larger co-plaintiffs with overlapping interests.

Indeed, Congress recognized that this phenomenon is particularly prevalent in securities litigation, and enacted the PSLRA in part to increase the likelihood that large institutional investors (such as Petitioner) would serve as lead plaintiffs in securities class actions. *See, e.g.*, S. Rep. No. 104-98, 11 (1995); H.R. Conf. Rep. No. 104-369, 34 (1995). Congress thus established a rebuttable presumption that the plaintiff with "the largest financial interest" in the suit is the "most adequate" representative of a securities class. 15 U.S.C. §§77z-1(a)(3)(B)(iii), 78u-4(a)(3)(B)(iii). Experience has borne out Congress' prediction: The involvement of sophisticated institutional investors in securities class actions "correlate[s] with a significantly greater outcome for the class." Stephen J. Choi et al., *The Impact of the Lead Plaintiff Provision of the Private Securities Litigation Reform Act*, 83 Wash. U. L.Q. 869, 892 (2005).

Under Petitioner's preferred regime, however, large, sophisticated, and well-resourced institutional investors would have greater incentives *not* to seek

the helm of securities class actions. Instead, those sophisticated parties could simply sit on their hands and free-ride for years while others litigate the class action. Then, once a class settlement is reached, they could use the class settlement as a baseline, opt out of the class, and launch individual suits to seek a greater recovery for themselves. Petitioner is no stranger to such a strategy, as it routinely boasts that its separate opt-out actions have yielded more money that it would have obtained through the class settlements. *See supra* pp.8-9, 49.

Allowing indefinite tolling of statutes of repose would merely increase the time in which large institutional investors can free-ride off a class action before they opt out to seek a greater recovery on their own.[10] None of this has anything to do with protecting "smaller investors," Pet.Br.25, or advancing the purposes of Rule 23, and it is directly contrary to the PSLRA's explicit goal of encouraging large institutional investors to remain within the class-action regime for the benefit of all class members. Simply put, all investors, especially smaller ones, are better off with large institutional investors inside the class fighting for a better result for all than with them outside the class seeking a better deal only for themselves.

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[10] The institutional investor amici candidly acknowledge this incentive to free-ride. *See* Institutional Investors Br. 11. By remaining "passive class member[s]," large institutional investors can obtain the benefits of the class action without subjecting themselves to the "costs and expenses" of litigation and discovery. *Id.*

C. Applying Section 13's Three-Year Statute of Repose as Written Would Not Violate Due Process.

Finally, Petitioner asserts that a refusal to extend *American Pipe* to statutes of repose would compromise opt-out rights in ways that violate due process, Pet.Br.25-29, but that argument fails on a number of levels.

At the outset, Petitioner fundamentally misconstrues the relevant due process interest served by the Rule 23(b)(3) opt-out right. As the court of appeals recognized, the "due process protections of Rule 23 are directed at preventing a putative class member from being bound by a judgment without her consent." Pet.App.5a. That due process interest is fully protected as long as the absent class member is "provided with an opportunity to *remove himself from the class* by executing and returning an 'opt out' or 'request from exclusion' form to the court." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) (emphasis added). Here, it is undisputed that Petitioner was provided with (and availed itself of) such an opportunity, and thus will not be bound by any judgment or settlement without its consent. That is sufficient to protect the relevant due process interest. *See id.*

But while the Due Process Clause may provide a right to opt out of certain class actions, *but cf.* Fed. R. Civ. P. 23(b)(2), nothing in the Constitution or anything else guarantees that an absent class member will have a viable individual action to opt into. Petitioner's argument to the contrary, *see* Pet.Br.27, has no legal support and proves far too

much. A post-opt-out individual suit may suffer all manner of obstacles, from mootness to lack of jurisdiction to untimeliness to just plain-old lack of merit. Indeed, an absent class member may have the greatest incentive to opt out when the class settlement provides relatively little recovery for her particular kind of claim. In some cases, that paltry recovery may reflect an adequacy problem or lack of diligence on the part of the class representative. But in most cases, the same relatively modest recovery that creates an incentive to opt out flows from a merits difficulty that renders a post-opt-out individual action impractical. That does not create even a hint of a due process problem, and it is no different if the post-opt-out individual action faces a statute of repose problem. The right to opt out of a judgment that the absent class member did not procure satisfies the Due Process Clause wholly apart from whether there is a viable claim to opt into.[11]

Petitioner asserts that "[m]any class members will not even be aware of the lawsuit from which they must opt out until they receive the class notice after the three-year period has already expired." Pet.Br.27. Those class members may still benefit from a class action settlement, but nothing in the Due Process Clause gives them a right to pursue an

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[11] Petitioner (at 25) cites out of context this Court's statement in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999), that "everyone should have his own day in court." *Ortiz* involved a *mandatory* settlement class under Rule 23(b)(1)(B) that did not include *any* opt-out rights. That case thus raised very different issues from the non-mandatory Rule 23(b)(3) class here.

individual action notwithstanding their lack of awareness of any misrepresentation or omission within three years of the public offering of the security. In other words, those relatively unaware class members may get a windfall from the happenstance that some other investor timely filed an action and sought class treatment. But that does not mean they also obtain a free pass to file a belated individual action notwithstanding the clear language of Section 13. "In no event" does not mean "in the event that another investor files a timely action that belatedly provides notice of a misrepresentation but does not provide an optimal recovery to the otherwise unaware investor."

Nor can Petitioner fashion a due process problem out of the reality that it and other opt-out plaintiffs might not have perfect information from which to decide whether to file individual actions or remain in the class. *See* Pet.Br.25-26 (arguing that "it often takes a while before a class member can determine whether the class action will vindicate its interests"). *No litigant* has the luxury of being able to make all of its decisions with perfect foresight. For example, an individual litigant remains bound by the three-year statute of repose even though this rule might force it to bring suit in the face of uncertainty about certain key facts. Having to make a decision while confronted with some uncertainty is a common feature of all litigation—not a due process problem that requires this Court to override an unambiguous statute of repose.

Petitioner's policy arguments rest on the premise that an individual opt-out suit is the *only* way for a

class member to protect itself against an unfair or unreasonable settlement. But that simply disregards Rule 23's myriad protections for those who remain in the class, and the active role the Rule envisions for courts in managing class proceedings throughout. Rule 23(a) requires that the class representatives have claims "typical" of the class, and that they "will fairly and adequately protect the interests of the class." And Rule 23(e) ensures that the class plaintiffs do not settle or dismiss class claims without robust judicial oversight to ensure the fairness of the resolution for the class. Before approving a class settlement, a court must hold a hearing at which all class members who wish to do so have an opportunity to "object to the proposal" at hand. Fed. R. Civ. P. 23(e)(5). The court may then approve the settlement only if it is "*fair, reasonable, and adequate*," Fed. R. Civ. P. 23(e)(2) (emphasis added), and only after engaging in a multi-factor assessment—just as the district court did here. J.A.80-88.

Thus, a class member that does not file an individual action before the running of a statute of repose still has robust rights to ensure that the class settlement is fair, even though she may not have a viable individual action if she opts out. Indeed, as already noted, from the standpoint of smaller investors and the overall interests of the class, it is better to have sophisticated institutional investors like Petitioner inside the class objecting to suboptimal settlements (for the benefit of all class members) rather than opting out seeking a better deal only for themselves.

Finally, it is absurd for Petitioner to suggest (at 28-29) that it was unfairly deprived of the money it otherwise would have received through the class settlement. At the time Petitioner opted out of the settlement, Petitioner should have known to a certainty that the district court would dismiss its individual action as untimely. *See supra* pp.9-10. Petitioner nonetheless rolled the dice and opted out of the class in the hope that its untimely individual suit would be reinstated on appeal. Giving up its bird in the hand (the class recovery) to seek two in the bush (an even-more-lucrative individual settlement) was a calculated gamble by a sophisticated litigant, not a "severe burden" on Petitioner's due process rights. Pet.Br.29.

* * *

At bottom, even if this Court agrees with each and every one of Petitioner's policy arguments, it still should affirm. Petitioner asks this Court to "advance the purposes of the *American Pipe* rule." Pet.Br.15. Respondents, by contrast, ask this Court merely to respect the policy judgments *Congress* has already made in enacting a statute of repose—*i.e.*, a legislative cutoff that grants defendants absolute "freedom from liability" after three years. *Waldburger*, 134 S. Ct. at 2183. At the end of the day, "Congress gets to make policy, not the courts." *Omnicare*, 135 S. Ct. at 1331.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

Respectfully submitted,

VICTOR L. HOU
JARED GERBER
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, NY 10006

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
MATTHEW D. ROWEN
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Respondents

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CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM,

Petitioner,

v.

ANZ SECURITIES, INC., ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

REPLY BRIEF FOR THE PETITIONER

Darren J. Robbins
Joseph D. Daley
Thomas E. Egler
ROBBINS GELLER
RUDMAN & DOWD LLP
655 West Broadway
Suite 1900
San Diego, CA 92101

Thomas C. Goldstein
Counsel of Record
Tejinder Singh
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda MD, 20814
(202) 362-0636
tg@goldsteinrussell.com

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR THE PETITIONER 1

I. There Is No Merit To Respondents' Argument That This Court's Order Granting Certiorari Excludes Considering The Fact That The Class In This Case Was Certified. 2

II. Petitioner's Complaint Was Timely Under Section 13. 8

CONCLUSION 22

TABLE OF AUTHORITIES

Cases

American Pipe & Constr. Co. v. Utah,
414 U.S. 538 (1974) ..... passim

Crown, Cork & Seal Co. v. Parker,
462 U.S. 345 (1983) 8, 14

Edwards v. California,
314 U.S. 160 (1941) 14

Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (1974) 14

Jones v. Bock,
549 U.S. 199 (2007) 15, 17

Statutes

15 U.S.C. § 16(b) (1970) 20

15 U.S.C. § 77m 9, 10, 21

REPLY BRIEF FOR THE PETITIONER

There is no dispute that petitioner's claims under Section 11 of the Securities Act were brought by a class action complaint within the time limits set by Section 13. Petitioner's choice to then pursue those very same claims against the very same defendants on its own behalf did not retroactively render the claims untimely. This Court held as much in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974).

Respondents principally argue that Section 13's three-year time limit is a "statute of repose" that is not subject to equitable tolling. Even if that is so, petitioners prevail. The initial class complaint timely brings the claims of each class member, so they neither seek to defer the date for initiating their claims nor seek to invoke any equitable principle. The timeliness of the class members' individual claims is most obvious on facts like these, where the class action was certified. Not only did the class action complaint initiate the action, but the class claims therefore always remained pending, so there is no gap in time to toll *at all* prior to the filing of petitioner's own complaint.

Respondents argue that the Court purposefully directed the parties not to present that issue. Indeed, they accuse us of a "brazen" refusal to follow an Order of this Court. Because that is a serious claim that is also seriously inaccurate, we begin with it.

I. There Is No Merit To Respondents' Argument That This Court's Order Granting Certiorari Excludes Considering The Fact That The Class In This Case Was Certified.

Petitioner's Opening Brief advanced two related arguments for reversal. First, petitioner's complaint was timely filed under this Court's decision in *American Pipe* without resort to any form of tolling, because this is not a case in which the class action mechanism failed. Rather, petitioner simply took control of its own, still pending claim. *See* Br. 30-38. Second, in any event, "*American Pipe* tolling" applies to the three-year time limit of Section 13. *See id.* 38-50.

Respondents contend that this Court precluded consideration of the first argument in petitioner's Opening Brief by granting certiorari limited to Question One set forth in the Petition for Certiorari. Indeed, they make that claim in strident terms, repeatedly accusing us of a "brazen disregard" of this Court's Order and "explicit instructions"; conduct that respondents say the "Court should not tolerate." Br. 2, 16; *see also id.* 39-41. Those are serious claims. They are also wrong. It is surprising and unfortunate that otherwise able counsel would encourage the coarsening of the presentation of matters to the Court. It is worse when the allegations are not true.

The Petition advanced two Questions Presented:

> 1. Does the filing of a putative class action serve, under the *American Pipe* rule, to satisfy the three-year time limitation in Section 13 of the Securities Act with respect to the claims of

> putative class members? (Question granted in *IndyMac*)
>
> 2. May a member of a timely filed putative class action file an individual suit on the same causes of action before class certification is decided, notwithstanding the expiration of the relevant time limitations?

Pet. i.

Question One thus broadly asks whether petitioner can "satisfy" the time limitation of Section 13 under *American Pipe*, not merely whether petitioner prevails under principles of "*American Pipe* tolling." Question Two raises a quite different issue: whether a class member can file its own complaint "before class certification is decided." There is no dispute that the merits argument in question – that tolling is unnecessary because the class was certified – fits easily within the terms of Question One.

The body of the Petition confirmed what the Questions Presented already made clear. It argued that the case implicated two separate circuit conflicts that track the two Questions Presented.

Question One addressed the application of *American Pipe* to Section 13. Directly contrary to the rule applied by the Second Circuit in this case, the Tenth Circuit holds that a class member's complaint is timely in these circumstances for *two* independent reasons: (i) *American Pipe* tolling applies to Section 13; and (ii) in a case in which the class is certified, the complaint is timely under *American Pipe* without resort

to tolling at all. *See* Pet. 10-12, 27. The latter holding is the merits argument now at issue.

Question Two addressed an entirely separate circuit conflict over whether a class member may file its own complaint prior to the district court's ruling on class certification. That conflict turns on a different legal issue: the class member's status as a party to the litigation. The Second Circuit permits that procedure – a rule that favors petitioner. The First and Sixth Circuits do not. *See* Pet. 31. The Petition urged the Court to grant Question Two to resolve this separate conflict. *See id.* 3 ("This case presents the opportunity to decide the question on which the Court granted certiorari in *IndyMac* and simultaneously resolve another circuit conflict over whether *American Pipe* applies when a class member files its individual suit before class certification is decided."); *id.* 9 ("The second Question Presented – whether *American Pipe* applies when a member of a timely filed putative class action files an individual suit *before class certification is decided* – has likewise fractured the circuits for years." (emphasis added)).

In their Brief in Opposition, respondents argued that certiorari should be denied with respect to Question Two because, *inter alia*, it was not properly presented by the case. They pointed out that petitioner had not presented the issue to the Second Circuit, which moreover had not passed on it; to the extent it arose in the case, the Second Circuit's rule favored petitioner. *See* BIO 34 ("Even if the ancillary, *pre-class-certification tolling issue* did present a significant circuit split, this appeal would be an inappropriate

vehicle to consider the issue because it was not raised below. Moreover, even if it had been raised, Petitioner would have prevailed, and therefore would not be an appropriate party to raise the issue here." (emphasis added)). In addition, respondents explained, that issue would be an independent basis for affirmance that would present an obstacle to resolving the principal conflict presented by Question One over the application of *American Pipe*. *See id.* 35.

This Court agreed with respondents. It granted certiorari limited to Question One (the application of *American Pipe*), denying review of Question Two (whether a class member may file its own complaint prior to the district court's ruling on class certification). In turn, petitioner's Opening Brief addressed only Question One, which as discussed encompasses two related theories.

Indeed, it would have made little sense for this Court to refuse to consider whether a class member's complaint is timely in cases in which the class is certified. As discussed, that issue is itself the subject of a direct conflict between the Second and Tenth Circuits. Refusing to consider it would leave the circuit split unresolved. That was presumably a consideration when this Court choose this case among the available pending vehicles to review.

Respondents' contrary characterization of the Questions Presented – and in turn this Court's Order granting certiorari – is not accurate. There is an easy way to know at the outset whether an argument lies outside the issues this Court has agreed to decide: the

objecting party will *accurately quote* the Questions Presented. Respondents do not. They represent that

> [t]he petition for certiorari presented two distinct questions: (1) "Does the filing of a putative class action serve, under the *American Pipe* rule, to satisfy" Section 13's three-year statute of repose with respect to putative class members' individual claims; and (2) whether, even if not, a member of a timely filed putative class action may bring an individual action asserting the same claims. Pet. i.

Br. 39. But respondents' choice to rewrite Question Two – which is strikingly unnecessary, given its brevity – does not accurately reflect the actual question. By its terms, Question Two addressed the distinct circuit conflict over whether a class member may file its own complaint "before class certification is decided." Pet. i.

Respondents then mischaracterize the body of the Petition. They represent that the Petition discussed the argument that a class member need not resort to tolling "in support of the non-granted QP2" because it appeared "in the QP2 portion of the petition." Br. 40. That is not so. The cited discussion occurs at pages 27 and 28 of the Petition, neither of which discusses Question Two *at all*. The discussion of "[g]ranting certiorari on the second Question Presented" appears

beginning on page 29 under a separate heading, which addresses that distinct circuit conflict. *See* Pet 29.[1]

But respondents' argument truly travels through the looking glass at pages 44 to 45 of their brief on the merits. There, respondents devote a distinct section (II.B.2) to the argument that the judgment should be affirmed on the alternative ground that petitioner filed its complaint prior to the certification of the class. *See* Br. 45 ("Unless and until a class certification order is issued, non-named class members are not parties to the class action *at all* and cannot be deemed to have 'brought' or 'commenced' any claims for purposes of determining whether a later-filed individual action is timely."). Yes, having just argued in the most strident terms that this Court precluded consideration of Question Two – and having accused us of improperly disregarding the Court's Order – respondents proceed to make exactly the argument this Court actually declined to consider (at respondents' own urging, no

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[1] We acknowledge that a sentence in the certiorari Reply Brief could be read to support respondents' reading of Question Two. Respondents themselves do not rely on it, and thus presumably agree it does not support their position. It states (at 8-9): "This case also presents a second question, which is whether CalPERS' claims are timely because it took over its causes of action before judgment was entered on the class complaint, so that CalPERS always had a live claim, and tolling—as that term ordinarily is used—was unnecessary." In that sentence, the phrase "a second question" refers to a second legal issue in the case, not Question Two presented by the Petition. As discussed above, the Petition itself is unambiguous.

less). We will leave rhetoric aside and simply point out without hyperbole that the issue is excluded by the Order granting certiorari. That seems a sufficient and appropriate way to make the point.

II. Petitioner's Complaint Was Timely Under Section 13.

In this case, the Class Action Complaint asserted claims against respondents under Section 11. The class was certified as part of a settlement. Petitioner is an unnamed class member. It filed its own complaint asserting the same claims against respondents and opted out of the class to litigate those claims on its own. Thus, petitioner's claims are wholly encompassed within the class complaint; they constitute merely the subset of the class claims that always belonged to petitioner.

A similar scenario arises when class certification is denied instead of granted. The class complaint asserting the claims remains pending, because it is not dismissed on the merits. But an individual member of the putative class must then file or join a new suit if she wants to vindicate the identical claims on her own behalf. *See Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983).

The question is whether such an individual action is timely filed under Section 13. The statute provides:

> No action shall be maintained to enforce any liability created under [Section 11] . . . unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the

> exercise of due diligence . . . . In no event shall any such action be brought to enforce any liability created under [Section 11] . . . more than three years after the security was bona fide offered to the public . . . .

15 U.S.C. § 77m.

The text can be read two ways. On petitioner's reading, the class action complaint "brought" the "action" for each class member. The individual class members' claims were therefore timely filed. Those claims cannot retroactively be deemed *untimely* by a class member's prompt submission of its own complaint setting forth the same cause of action.

To be sure, if class certification is denied (or granted and the plaintiff opts out), the plaintiff must then pursue her own claim. But having already *satisfied* the limitations period, the action remains timely so long as the class member continues to pursue the exact same "action." She simply must do so within whatever time remained in the limitations period when the class action complaint was filed. In that sense, the limitations period is "tolled" by the pendency of the class action. This is so-called "*American Pipe* tolling." *See American Pipe*, 414 U.S. at 553.

Respondents' contrary reading of Section 13 is that the class member's individual complaint starts a separate "action" that must itself independently satisfy the relevant time limitations. In addition, respondents argue, the statute's three-year time limit is not subject to equitable tolling. On that view, petitioner filed its individual complaint too late.

For several reasons, petitioner has the better interpretation of the statute.

1. Start with the text of Section 13. Properly understood, the class action complaint timely brings each class member's "action," which is the claim under Section 11. So long as the individual class member continues to assert the identical legal claim against the identical defendants, she is pursuing the same "action," which remains timely. The fact that the class member does so through a different pleading makes no difference to the timeliness of the action.

Critically, there actually is no dispute that – in the words of Section 13 – the class action complaint "brought" the "action" on behalf of each unnamed class member. That is the only way class members can recover if the class is certified and they do not opt out because the class action complaint is the *only* place their claims are asserted. Nor can that dilemma be avoided by characterizing the unnamed plaintiffs as "joining" the complaint upon class certification. Often that will not occur until the three-year time limit has long since run. *See* Pet. Br. 24, 26-27; Civ. Pro. & Sec. Scholars *Am.* Br. 5-11.

Recognizing as much, *American Pipe* squarely holds that that "the filing of a timely class action complaint commences the action for all members of the class." 414 U.S. at 550. That holding reads on the text of Section 13. In a case like this one, the class action complaint "brought" the "action" of every class member (including petitioner) within three years of the securities being offered to the public. 15 U.S.C. § 77m.

Respondents' reading cannot be reconciled with the statutory text. On their view, even though the class action "brought" the "action" for each class member, the filing of a subsequent individual complaint advancing a subset of that action somehow retroactively bars those claims. But respondents cite no authority for the proposition that a timely action can somehow become untimely upon the filing of a new pleading advancing exactly the same cause of action.

Respondents' understanding of how Section 13 functions is similarly implausible. On their view, Congress intended to require every single member of a class that asserts a claim under Section 11 to file her own individual suit, or at least participate by name in mass actions. That would be the only practical way for victims to pursue their rights, given the fact that class certification decisions frequently are not made until years after a class action complaint is filed. Pet. Br. 24, 26-27; Civ. Pro. & Sec. Scholars *Am.* Br. 5-11. In the context of Section 11 – which involves securities offerings – that could amount to *thousands* of separate complaints in every case.

Why would Congress want to require all that waste, with no corresponding benefit to *anyone*, including the defendants that are the beneficiaries of the repose period? It would not. Respondents' rule is directly contrary to the design of the securities laws and the Rules of Civil Procedure. The Private Securities Litigation Reform Act of 1995, in particular, has detailed procedures that place a lead plaintiff in charge of securities litigation. *See* Pet. Br. 24. The statute works hand in glove with Rule 23's procedures for the

appointment of a named plaintiff and lead counsel, with limited participation of unnamed class members. The very purpose of both the Act and the Rule is to limit the amount of independent litigation of common questions – the opposite of the regime respondents say Congress enacted.

The reasoning of *American Pipe* thus applies fully here. In *American Pipe*, the Court read Rule 23 in a fashion that would avoid inducing plaintiffs to file exactly the multiplicity of actions that the Rule was enacted to eliminate. If respondents prevail here, then in every later case the only responsible course is for individual class members to participate in the litigation. That is enormously wasteful for the judiciary and litigants, including defendants. *See* Pet. Br. 22-24; Corporate Directors *Am.* Br. 10-15.[2]

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[2] Respondents contrary view that those independent actions will not be filed, Br. 47-48, is irreconcilable with *American Pipe* and amounts to a prediction that plaintiffs just will not care about potentially losing their claims as untimely. The thousands of cases off all types filed every day within the statute of limitations are strong evidence to the contrary.

Respondents contend that the effects of the Second Circuit's rule have been limited so far. But those effects are already being seen. *See* Institutional Investor *Am.* Br. 15-16. A group of retired district judges has explained that a ruling in respondents' favor would inevitably disrupt the administration of these complicated cases. Retired Judges *Am.* Br. 7-20.

Respondents argue to the contrary that opt-out claims are deleterious and plaintiffs should simply be encouraged to participate in the class process. Br. 51-53. But that gets the effect of respondents' rule exactly backwards, and reduces to the assertion that *American Pipe* – which is driven by the desire to avoid independent litigation by class members – is wrongly decided. *American Pipe* explains that the inevitable effect of deeming such claims untimely is to induce individual class members to file and pursue their own lawsuits early in the litigation. *See* 414 U.S. at 553-54.

To be sure, in cases governed by Section 13, respondents' rule does make the opt-out process largely worthless once the three-year period has expired. But that is a result to be avoided, not embraced. The prospect that plaintiffs could opt out of an inadequate or otherwise unreasonable settlement is an important inducement for class counsel to represent the interests of the entire class fairly. *See* Pet. Br. 24-25.

The resulting impingement on the right to opt out also casts significant constitutional doubt on

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The *amicus* brief of Civil Procedure & Securities Scholars details why opt outs have not been even more widespread yet. *See* Civ. Pro. & Sec. Scholars *Am.* Br. 17-20. Among other things, this Court immediately cast doubt on the Second Circuit's rule by granting certiorari to review the first case to announce it, which is of relatively recent vintage in any event. A decision of *this* Court announcing a nationwide rule that plaintiffs must file their own independent actions to protect their rights under every statute that contains a statute of repose will – not surprisingly – produce exactly that bad result.

respondents' reading of the statute. Respondents assert that plaintiffs merely have the right to opt out of a class action – a right that they say is satisfied even if the plaintiffs will as a matter of certainty opt out into the nothingness of a claim that will be dismissed as untimely as a matter of law. Br. 54-55. Respondents contend that the Due Process Clause here is, in the words of Justice Jackson, "a teasing illusion like a munificent bequest in a pauper's will." *Edwards v. California*, 314 U.S. 160, 186 (1941) (concurring opinion).

That is incorrect. Indeed, respondents' argument is irreconcilable with the very existence of the opt-out right in these circumstances. What would be the point? *See* NASAA *Am.* Br. 15-16. A class member has the due process right to take control of her own claim for money damages if she becomes dissatisfied with the representation of class counsel, including because a class settlement is inadequate. *See Crown, Cork & Seal Co.*, 462 U.S. at 351-52; *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 n.13 (1974). *See also* Pet. Br. 25-27; Public Citizen *Am.* Br. 14-21.

The problem is especially acute when – as in this case – the suit asserts not just claims under provisions subject to Section 13's three-year period (such as claims under Section 11), but also other claims that are not (such as those under Section 10(b) of the Exchange Act). A plaintiff is not permitted to opt out of a class action "in part." By forcing class members to accept a class settlement with respect to claims subject to Section 13, respondents' rule creates an inappropriate dilemma. The class members must either (i) opt out of the class

and abandon those claims as untimely, or (ii) give up the right to opt out altogether and thereby lose the opportunity to pursue other claims individually. There is no reason to believe that Congress intended Section 13 to put class members in that untenable position. *See* Pet. Br. 27-28. Respondents strikingly do not argue otherwise.

2. Respondents do not actually dispute that petitioner did satisfy Section 13 when the Class Action Complaint was filed. Their theory must be that petitioner then somehow *unsatisfied* the limitations period by later filing its own independent lawsuit.

That is wrong, because the "action" that Section 13 requires to be brought within three years is the "cause of action," not the pleading. The Court's opinion in *Jones v. Bock*, 549 U.S. 199 (2007), surveys – in closely analogous circumstances – the meaning of "action" in the context of limitations periods and concludes that it refers to the party's claim. There is no reason a different result would follow here. *See* Pet. Br. 35. Respondents' answer to *Jones* (Br. 44-45) is uncompelling: they ignore the fact that *Jones* supported its holding by citing cases involving statutes of limitations. 549 U.S. at 220. Respondents also overlook that *Jones* rejected many of the arguments that they make here – for example, that Congress elsewhere distinguished between actions and claims, *see id.* at 222, and that policy concerns favored a restrictive reading of the statutory language, *id.* at 223.

In fact, respondents ignore all of the reasons that the "action" *must* be the "cause of action" in the specific context of Section 13. *See* Pet. Br. 36-38. Congress

would have been concerned with whether the plaintiff asserted the substance of her claim, not whether a new complaint was filed. Respondents' contrary position is pure formalism, because there is no practical reason that a class member needs to initiate a new lawsuit. Surely, a hypothetical Rule of Civil Procedure could authorize class members to submit a one-page notice that they intend to pursue the case on their own based on the allegations of the existing class complaint. On respondents' view, there would be no new judicial proceeding and thus no new "action," so Section 13 would not bar the suit as untimely. But in substance, the one-page filing under that hypothetical Rule is no different than petitioner's individual complaint in this case. Both do the same thing.

Respondents' contrary reading of "action" would produce still more nonsensical results in practice. For example, after the three-year period ran, one named plaintiff in a suit could not sever her individual claim into her own complaint with her own attorney, because that would be a new untimely judicial proceeding. Further, a complaint containing an untimely Section 11 claim but a timely claim under another provision (such as Section 10(b)) would have to be dismissed in its entirety, because the "action" was untimely. The consequence of not complying with Section 13 is thus that the "action" – which according to respondents is the judicial proceeding – may not "be maintained." 15 U.S.C. § 77m. The list goes on. Congress would not have intended the statute to produce those bizarre results, none of which arise if "action" is properly read to mean the "cause of action." *See* Pet. Br. 35-38.

Respondents note that in some other contexts Congress distinguished an "action" from a "claim," including in some other provisions of the securities laws – though notably not Section 13. *See* Resp. Br. 42-43. None of those are limitations periods, and *Jones* explains that in *that* context an "action" is generally the cause of action. Respondents also point to Federal Rule of Civil Procedure 3, which provides that "[a] civil action is commenced by filing a complaint with the court." *See* Br. 43 n.6. But the plain import of the Rule is that the "action" is *different* from the "complaint," which is instead the vehicle for asserting it. In a case like this one, the action was timely asserted by the class action complaint.

3. Respondents argue that Section 13's three-year time limit is written in the form of a "statute of repose," which they say cannot be tolled. Br. 26-27. That argument is no help to respondents in a case like this one, in which tolling is not necessary at all. There was *no gap in time* between the pursuit of petitioner's claim in the Class Action Complaint and CalPERS's parallel individual complaint. The Class Action Complaint remained pending at all times, and the class was in fact certified. *See* Pet. Br. 30.

Even in those cases in which the plaintiff opts out after class certification is denied, respondents' argument is not persuasive because it begs the question. Section 13 does not generically prohibit tolling of any kind. Rather, even on the reading most favorable to respondents, it specifies a single point in time that cannot be extended: when the "action" must be "brought." In other words, it is directed to the start

of the case, not what happens after the action commences. If the action was timely brought by the class action complaint, then the time limit is satisfied and nothing in the statute precludes the application of *American Pipe* tolling to require the plaintiff to file her separate complaint within whatever time remained when the class action complaint was filed.

There is no textual support for respondents' broader view that the three-year period bars equitable tolling *even after* the action is brought. Br. 26-27. On its face, the statute addresses only when the action is initiated. But in any event, "equitable tolling" is concerned with whether the individual circumstances of a particular case justify the plaintiff's delay in bringing suit in the first instance. *American Pipe* tolling is completely different. It is not concerned with the initial filing of the action and applies without regard to the equities of any plaintiff's case. Instead, it is an interpretation of Rule 23 that reconciles the fact that, although the class action complaint must initiate each plaintiff's claim, a class member cannot have an open-ended time to pursue her own action once the district court decides that the Rule precludes certification of the class. *American Pipe* tolling is moreover concerned with preserving the efficient functioning of the judiciary, as much or more than the interests of individual plaintiffs. *See* Pet. Br. 16-19; DeKalb *Am.* Br. 12-13.

Respondents' reading of Section 13 also is inconsistent with the purpose and function of a statute of repose. They argue that such a provision permanently cuts off the defendant's liability. Br. 19. That is true as far as it goes, which is not very far.

Section 13 provides that a defendant is not liable *only* if a *particular event* occurs: the plaintiff's claim is not timely asserted. If a claim is timely filed, a repose period is not a guarantee against the defendant later being held liable. It can take a decade or more to litigate cases, and in that time the plaintiff may change lawyers, legal strategies, damages theories, and many other aspects of her case – all of which might result in greater liability for the defendant. The statute of repose says nothing about those developments. It is instead a requirement that a claim be advanced within a fixed period of time so that the defendant can plan, because it knows it will not be subject to new assertions of liability later. *See* Pet. Br. 33-34.

Only petitioner's reading is consistent with this correct understanding of the functioning of a repose period. The class action complaint puts the defendants on notice of all the claims of each class member. *American Pipe* addresses that exact point, explaining that the class action complaint

> notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment. Within the period set by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation, whether the actual trial is conducted in the form of a class action, as a joint suit, or as a principal suit with additional intervenors.

American Pipe, 414 U.S. at 555.

Here, respondents unquestionably knew of petitioner's precise claims within the time limits set forth in Section 13. They do not even argue that they were subject to any surprise when petitioner filed its own complaint. Every claim pleaded against every defendant in the CalPERS Complaint appears in the timely filed Class Action Complaint. The only difference is that CalPERS pursued those claims with its own lawyers, as was its right.[3]

Respondents also never answer the point that, on their broad view that statutes of repose prohibit any form of tolling, *American Pipe* itself is wrongly decided. *See* Pet. Br. 43. The time limit in that case provided in absolute terms that a civil suit "shall be forever barred unless commenced . . . within" one year after the conclusion of an antitrust suit brought by the United States. 15 U.S.C. § 16(b) (1970). That wording is, if anything, even more categorical than the language Congress used in the three-year period of Section 13. Yet this Court concluded without difficulty in *American Pipe* that the class action complaint "commence[d]" the unnamed plaintiffs' actions, and moreover that the time

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[3] Respondents' only answer wildly overreads the role of a statute of repose. They argue that opt-out complaints like petitioner's produce greater recoveries. Br. 52-53. That is often untrue; opt-out plaintiffs frequently lose their cases on the merits. Respondents do not contend that those suits are therefore timely filed. In any event, Section 13 obviously does not provide an immunity against better advocacy by victims of defendants' wrongdoing, who have the right to opt out under both Rule 23 and the Due Process Clause.

to pursue an individual suit under that limitations period was tolled prior to the denial of class certification. *See* 414 U.S. at 550-51, 558.

Respondents argue to the contrary that the key to understanding that Section 13 bans tolling is the textual phrase "[i]n no event." Br. 21-22. But that is just another way of making the same argument. The statute says that "in no event" can the "action" be "brought" after three years. 17 U.S.C. § 77m. If the relevant action is set forth in the class action complaint, then it is timely brought.

The same is true of respondents' invocation of the Rules Enabling Act. Br. 37-38. Because a class action complaint timely asserts the claim of the unnamed class members, *American Pipe* tolling does not negate any substantive right provided by Section 13. But in any event, respondents' understanding of the Rules Enabling Act is seriously mistaken. *American Pipe* itself rejects an indistinguishable argument, explaining that time limits do not implicate the Act because they govern procedure, rather than substantive rights. *See* Pet. Br. 48-51; Public Citizen *Am.* Br. 5-14; SRM *Am.* Br. 6-11.

Furthermore, in context, that phrase only serves to cut off the statute's one-year discovery rule. Section 13 provides that "[i]n no event shall any such action be brought" after more than three years. 15 U.S.C. § 77m. The limited phrase "*[s]uch* action" is not *every* action under Section 13. Rather, it more narrowly refers back to the prior sentence of the statute, which provides an open-ended rule discovery rule that would otherwise indefinitely extend the limitations period if the

defendants' wrongdoing could not otherwise reasonably be identified.

Petitioner's understanding of Section 13 thus makes perfect sense. The one-year time limit provides a "discovery rule" to toll the time in which the action will be "brought." The further three-year limit does not. So, plaintiffs must sue within three years, even if they could not have reasonably discovered the defendants' wrongdoing by then. The statute thereby cuts off the time to initiate an action, giving defendants confidence that they will not later face new and unexpected claims more than three years after the security is offered to the public. Here, the action was timely commenced by the class action complaint.

CONCLUSION

The judgment of the Second Circuit should be reversed.

Respectfully submitted,

Darren J. Robbins
Joseph D. Daley
Thomas E. Egler
ROBBINS GELLER
RUDMAN & DOWD LLP
655 West Broadway
Suite 1900
San Diego, CA 92101

Thomas C. Goldstein
Counsel of Record
Tejinder Singh
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
tg@goldsteinrussell.com

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Petitioner,

v.

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Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE SUPPORTING RESPONDENTS

BRIAN E. PASTUSZENSKI
DANIEL P. ROESER
GOODWIN PROCTER LLP
620 Eighth Avenue
New York, NY 10018

KATE COMERFORD TODD
STEVEN P. LEHOTSKY
JANET GALERIA
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

WILLIAM M. JAY
Counsel of Record
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
wjay@goodwinlaw.com
(202) 346-4000

STEPHEN D. POSS
DAVID R. FOX
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210

April 5, 2017

Library of Congress

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. Statutes of Repose Are Important Under a Wide Range of Federal and State Statutory Schemes That Routinely Are the Subject of Class-Action Litigation 5

A. Congress and State Legislatures Have Deliberately Selected Statutes of Repose to Limit Liability 5

B. Statutes of Repose Strike a Careful Legislative Balance to Mitigate the Threat of Long-Pending Contingent Liabilities 9

C. This Case Implicates a Wide Range of Statutes of Repose, Because Class-Action Litigation is Common Under the Relevant Statutes 11

II. Allowing Class-Action Tolling of Statutes of Repose Would Override Congress's and the States' Legislative Judgments, Violating the Separation of Powers and Depriving Defendants of the Certainty That Statutes of Repose Are Meant to Provide 13

III. Long Experience With Abusive Class-Action Practices Refutes Any Argument that "Notice" Can Defeat Repose 16

A. The Class Complaint Alone Does Not Provide Defendants with Adequate Notice of the Claims They May Someday Face Under *American Pipe* Tolling 17

B. Abusive Applications of American Pipe Tolling Can Compound the Potential Unfairness to Class-Action Defendants 21

IV. Declining to Extend the Tolling Doctrine to Statutes of Repose Will Not Overwhelm Court Dockets or Prevent Adjudication of Legitimate Claims 26

A. *IndyMac* Has Not Led to an Unworkable Surge of Protective Filings 27

B. The Professors' 2002 to 2009 Study Fails to Address the Relevant Question—The Time From Filing to Class Certification Decision 29

C. Allowing Tolling Would Undermine Other, Longer Repose Periods, Not Just the Securities Act Period 31

D. Repose Periods Are a Legislative Judgment So Any Changes Should Be Left to Congress 33

CONCLUSION 35

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Adashunas v. Negley,
626 F.2d 600 (7th Cir. 1980) 19

American Pipe & Constr. Co. v. *Utah*,
414 U.S. 538 (1974) .....*passim*

Archer v. Nissan Motor Acceptance Corp.,
550 F.3d 506 (5th Cir. 2008) 7, 11

Arivella v. Lucent Techs., Inc.,
623 F. Supp. 2d 164 (D. Mass. 2009) 11

Basch v. Ground Round, Inc.,
139 F.3d 6 (1st Cir. 1998)..... 25

Beach v. Ocwen Fed. Bank,
523 U.S. 410 (1998) 7

Benfield v. Mocatta Metals Corp.,
26 F.3d 19 (2d Cir. 1994)..... 20

Boilermakers Nat'l Annuity Trust Fund v. WaMu Mortg. Pass Through Certificates, Series AR1,
748 F. Supp. 2d 1246 (W.D. Wash. 2010)..... 23

Carrera v. Bayer Corp.,
727 F.3d 300 (3d Cir. 2013)..... 19

Crown, Cork & Seal Co. v. Parker,
462 U.S. 345 (1983) 17, 19, 21

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134 S. Ct. 2175 (2014) .....*passim*

Cullen v. Margiotta,
811 F.2d 698 (2d Cir.), *overruled on other grounds by Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*,
483 U.S. 143 (1987) 20

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832 F.3d 1243 (11th Cir. 2016) 4, 27

Edwards v. Boeing Vertol Co.,
717 F.2d 761 (3d Cir. 1983), *vacated on other grounds*, 468 U.S. 1201
(1984) 19

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825 F. Supp. 2d 1082 (D.N.M. 2011) 23

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17 F.3d 356 (11th Cir. 1994) 23

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134 S. Ct. 604 (2013) 33

Hill v. State St. Corp.,
No. 09-cv-12146-NG, 2011 WL
3420439 (D. Mass. Aug. 3, 2011) 22

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436 F.3d 782 (7th Cir. 2006) 18

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747 F. Supp. 850 (E.D.N.Y. 1990) 22

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674 F. Supp. 374 (D. Mass. 1987) 22

In re Exxon Mobil Corp. Sec. Litig.,
500 F.3d 189 (3d Cir. 2007) 6

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352 F. Supp. 2d 429 (S.D.N.Y. 2005), *abrogated on other grounds*, 574 F.3d 29 (2d Cir. 2009) 23

In re Hanford Nuclear Reservation Litig.,
534 F.3d 986 (9th Cir. 2007) 18, 31

In re Morgan Stanley Mortg. Pass-Through Certificates Litig.,
810 F. Supp. 2d 650 (S.D.N.Y. 2011) 24

In re Vertrue Inc. Mktg. & Sales Practices Litig.,
719 F.3d 474 (6th Cir. 2013) 25

In re WorldCom Sec. Litig.,
496 F.3d 245 (2d Cir. 2007) 18, 31

Johnson v. Nextel Commc'ns, Inc.,
660 F.3d 131 (2d Cir. 2011) 12

Johnson v. Ry. Express Agency, Inc.,
421 U.S. 454 (1975) 33

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827 F.2d 874 (2d Cir. 1987) 25

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No. 02-CV-3089 (ILG), 2006 WL 1212512 (E.D.N.Y. May 3, 2006) 22-23

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,
501 U.S. 350 (1991) 14, 15, 33

Manor v. D.R. Horton, Inc.,
No. 2:14-CV-2222 JCM, 2016 WL
1045484 (D. Nev. Mar. 15, 2016) 12

McCann v. Hy-Vee, Inc.,
663 F.3d 926 (7th Cir. 2011) 8, 9

McMillian v. AMC Mortg. Servs., Inc.,
560 F. Supp. 2d 1210 (S.D. Ala. 2008) 11

Merck & Co., Inc. v. Reynolds,
559 U.S. 633 (2010) 6

Mistretta v. United States,
488 U.S. 361 (1989) 15

Mobil Oil Corp. v. Higginbotham,
436 U.S. 618 (1978) 16

Moyle v. Liberty Mut. Ret. Ben. Plan,
823 F.3d 948 (9th Cir. 2016) 7

N.J. Carpenters Health Fund v. DLJ
Mortg. Capital, Inc.,
No. 08 Civ. 5653 (PAC), 2010 WL
6508190 (S.D.N.Y. Dec. 15, 2010) 22

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Nomura Home Equity Loan, Inc.,
764 F.3d 1199 (10th Cir. 2014) 7

Palmer v. Stassinos,
236 F.R.D. 460 (N.D. Cal. 2006) 23

Piazza v. Ebsco Indus., Inc.,
273 F.3d 1341 (11th Cir. 2001) 12

Plumbers' Union Local No. 12 Pension
Fund v. Nomura Asset Acceptance
Corp.,
894 F. Supp. 2d 144 (D. Mass. 2012) 24

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721 F.3d 95 (2d Cir. 2013) ..... *passim*

Radford v. Gen. Dynamics Corp.,
151 F.3d 396 (5th Cir. 1998) 7

Rose v. Ark. Valley Envtl. & Util. Auth.,
562 F. Supp. 1180 (W.D. Mo. 1983) 23

Salazar-Calderon v. Presidio Valley Farmers Ass'n,
765 F.2d 1334 (5th Cir. 1985) 25

Sawyer v. Atlas Heating & Sheet Metal Works, Inc.,
642 F.3d 560 (7th Cir. 2011) 19

Sibbach v. Wilson & Co.,
312 U.S. 1 (1941) 15

Stein v. Regions Morgan Keegan Select High Income Fund, Inc.,
821 F.3d 780 (6th Cir. 2016) 4, 27

Walker v. Armco Steel Corp.,
446 U.S. 740 (1980) 16

Wayman v. Southard,
23 U.S. 1 (1825) 15

Williams v. Boeing Co.,
517 F.3d 1120 (9th Cir. 2008) 21

Yang v. Odom,
392 F.3d 97 (3d Cir. 2004) 25

STATE CASES

Ackerman v. Price Waterhouse,
683 N.Y.S.2d 179 (App. Div. 1998) 12

Bryant v. Don Galloway Homes, Inc.,
556 S.E.2d 597 (N.C. Ct. App. 2001) 8

Klein v. Catalano,
437 N.E.2d 514 (Mass. 1982) 8

Rosenberg v. Town of N. Bergen,
293 A.2d 662 (N.J. 1972) 9

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28 U.S.C. § 1658(b)(2) 6, 34

28 U.S.C. § 2072(b) 13, 15, 27

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L. No. 109-2, 119 Stat. 4 32

Dodd-Frank Wall Street Reform and
Consumer Protection Act, Pub. L. No.
111-203, § 1085(7), 124 Stat 1376,
2085 (2010) 33

Employee Retirement Income Security
Act of 1974, 29 U.S.C. § 1101 *et seq.* .....*passim*

29 U.S.C. § 1113(1) 7, 10, 31

Equal Credit Opportunity Act, 15 U.S.C.
§ 1691 *et seq.* .....*passim*

15 U.S.C. § 1691e 7, 10, 12

Fair Credit Reporting Act, 15 U.S.C.
§ 1681 *et seq.* 6, 7. 12

15 U.S.C. § 1681p(2) 6, 31

Sarbanes-Oxley Act of 2002, Pub. L. No.
107-204, § 804(a), 116 Stat. 745, 801 33

Securities Act of 1933 .....*passim*

15 U.S.C. § 77k 31

15 U.S.C. § 77*l*(a)(2) 31
15 U.S.C. § 77m 14, 27, 31
Securities Exchange Act of 1934, Pub L. No. 73-291, § 207, 48 Stat. 907 ..... 6, 11
Truth in Lending Act, 15 U.S.C. § 1631 *et seq.* 7, 11
15 U.S.C. § 1635(f) 7

OTHER STATUTES

CAL. CORP. CODE § 25506(b) 9, 31
GA. CODE § 51-1-11(b)(2) 8
MASS. GEN. LAWS Chapter 260, § 2B 8, 31
MICH. COMP. LAWS § 600.5838b(1)(b) 9, 31
N.C. GEN. STAT. § 1-50(a)(5)(a) 8
NEB. REV. STAT. § 25-223 ..... 8, 31
OR. REV. STAT. § 30.905(2)(a) 9, 31
TENN. CODE § 28-3-104(c)(2) 9
TENN. CODE § 47-18-110 9
TEX. REV. CIV. STAT. Article 581, § 33(H)(2)(b) 9
WIS. STAT. § 425.307(1) 9

LEGISLATIVE HISTORY

78 Cong. Rec. 8198 (May 7, 1934) 34
S. Rep. No. 94-589 (1976) 10

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STEFAN BOETTRICH & SVETLANA STARYKH, RECENT TRENDS IN SECURITIES CLASS ACTION LITIGATION: 2016 FULL-YEAR REVIEW (Jan. 2017),goo.gl/o7S0zT 30

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EMERY G. LEE III & THOMAS E. WILLGING, IMPACT OF THE CLASS ACTION FAIRNESS ACT ON THE FEDERAL COURTS: PRELIMINARY FINDINGS FROM PHASE TWO'S PRE-CAFA SAMPLE OF DIVERSITY CLASS ACTIONS, goo.gl/HXzf0B 32

Thomas E. Willging & Emery G. Lee III, *Class Certification and Class Settlement: Findings from Federal Question Cases, 2003-2007* 32

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation.[1] It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent its members' interests in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases like this one that raise issues of concern to the nation's business community.

This case presents an issue of great importance to the nation's business community—one more broadly significant than the particular phrasing of the question presented might otherwise suggest. Chamber members routinely are named as defendants in putative class actions in federal court, under federal and state statutes that impose absolute time limits on defendants' liability. This case involves one such

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

statute, the Securities Act of 1933 (Securities Act), but many federal and state laws contain similar provisions. These absolute temporal limits on defendants' liability are termed "statutes of repose." *See CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182-83 (2014); 1 CALVIN W. CORMAN, LIMITATION OF ACTIONS § 1.1, at 4-5 (1991). Class litigation is common under many of these statutes.

Petitioner asserts that even though statutes of repose are designed as absolute time limits, federal courts may toll them whenever a putative class action is filed in federal court under the class-action tolling rule of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). Under petitioner's rule, the statute of repose in the Securities Act, and presumably any other federal or state statute of repose, may be circumvented by the simple expedient of filing a complaint on behalf of a putative class. Were that the rule, it could very well expose the Chamber's members and other business defendants to new litigation—and potentially to new liability—long after the point at which, in the legislature's judgment, they are entitled to peace. The Chamber therefore has a strong interest in the resolution of this issue.

SUMMARY OF ARGUMENT

As this Court recognized in *CTS Corp.*, statutes of repose are fundamentally legislative judgments. 134 S. Ct. at 2182-83. They reflect a legislative decision that defendants, at a certain and readily ascertained point, are entitled to peace and need no longer worry about defending actions taken long ago. By adopting a statute of repose, a legislature completely extinguishes liability after a clearly specified time.

Petitioner's broadest position—that Rule 23 somehow supersedes Congress's determination that liability must come to an end on a date certain—is inconsistent not just with Rule 23, but with the very notion of judicial rulemaking. Neither the Rules Enabling Act nor the separation of powers would permit the judiciary to write a rule contradicting the quintessentially *legislative* decision to adopt a set period of repose.

Petitioner submits that the mere filing of *a* class action before the repose date is enough, either because it provides a degree of notice or because it somehow constitutes the constructive "br[inging]" of claims by absent, often indeterminate class members. But the purpose of statutes of repose is to put an end to unasserted claims after a date certain, not to inform defendants that they may need to answer such claims by new plaintiffs in the future. And the mere pendency of a class action often does not provide reliable notice of exposure in any event. Abusive applications of the *American Pipe* rule have proliferated—for example, extending class tolling to *different* claims than those raised by a purported class representative; extending tolling even to filings by wholly inadequate placeholder plaintiffs, who file claims merely to stop the clock so a suitable representative can be sought; and approving the use of successive class actions to evade adverse rulings. Using these tools, class-action plaintiffs' lawyers in many cases are able to stretch out the repose period far beyond what Congress or the state legislature selected.

These consequences all may be avoided simply by enforcing statutes of repose as they are written and

were meant to be applied: to cut off liability absolutely once the statutory period has run. Contrary to petitioner's and its *amici*'s arguments, declining to extend *American Pipe* to repose periods does not threaten the efficacy of the class-action procedure. There is no evidence that the Second Circuit's *IndyMac* rule[2]—which has since been adopted in the Sixth[3] and Eleventh[4] Circuits as well—has produced any of the inefficiencies that petitioner raises in the over four years since that rule has been in effect. To the contrary, empirical evidence shows that federal courts efficiently manage putative class actions, including those brought under the securities laws, leaving adequate time to afford a meaningful choice whether to opt out. The solution to any perceived problems is not to disregard careful legislative judgments about how long a substantive right of action should exist: the solution is merely to announce a clear rule that statutes of repose will be enforced as written.

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[2] *See Police & Fire Ret. Sys. of the City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013).

[3] *See Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F.3d 780 (6th Cir. 2016).

[4] *See Dusek v. JPMorgan Chase & Co.*, 832 F.3d 1243 (11th Cir. 2016).

ARGUMENT

I. Statutes of Repose Are Important Under a Wide Range of Federal and State Statutory Schemes That Routinely Are the Subject of Class-Action Litigation

The Securities Act provision at issue here is just one of the many statutes of repose, federal and state, that could be affected by the Court's holding in this case. These various statutes share a common purpose: ensuring that "'after the legislatively determined period of time,'" the defendant "should be able to put past events behind him." *CTS Corp.*, 134 S. Ct. at 2183 (quoting 54 C.J.S., LIMITATION OF ACTIONS § 7, at 24 (2010)). Because that purpose is "central" to statutes of repose, their time periods "generally may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff's control." *Id.* And although class actions are common under many of these statutes, none of them makes an exception to that strong policy of repose for unnamed class members. Endorsing petitioner's position that a statute of repose *can* be tolled, ostensibly for the sake of better class-action administration, threatens the efficacy of hundreds of statutes of repose and the careful legislative judgments they reflect.

A. Congress and State Legislatures Have Deliberately Selected Statutes of Repose to Limit Liability

As this Court explained in *CTS Corp.*, a legislature's enactment of a statute of repose represents a significant policy choice. Although "there is substan-

tial overlap between the policies of" statutes of repose and statutes of limitations, statutes of repose are animated by "a distinct purpose," *CTS Corp.*, 134 S. Ct. at 2183, and in pursuing that purpose they "strike a stronger defendant-friendly balance." *In re Exxon Mobil Corp. Sec. Litig.*, 500 F.3d 189, 199-200 (3d Cir. 2007). The prohibition of tolling is "central" to the selection of a statute of repose rather than, or (as here) in addition to, a statute of limitations. *CTS Corp.*, 134 S. Ct. at 2183. Both Congress and state legislatures have opted to include repose periods, and to reject tolling, in a number of significant statutes—statutes that the resolution of this case could affect. A complete catalogue of repose statutes is beyond the scope of this brief. But certain key examples are illustrative.

1. Perhaps the best-known federal example is the five-year repose period that governs fraud and related claims under the securities laws, 28 U.S.C. § 1658(b)(2). The same statute creates a corresponding limitations period for the same securities claims (two years from discovery). This Court has emphasized that no matter how the *limitations* provision is construed, the *repose* provision "giv[es] defendants total repose," thereby "diminish[ing] th[e] fear" of being "subject . . . to liability for acts taken long ago." *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 650 (2010).

But federal statutes of repose also appear outside the securities context, in a number of important and frequently invoked statutes. For instance, Congress included statutes of repose in the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*, and the Equal Credit Opportunity Act (ECOA), 15 U.S.C.

§ 1691 *et seq.* Both statutes place an absolute five-year limit on recovery. *See* 15 U.S.C. §§ 1681p(2) (FCRA), 1691e(f) (ECOA); *see also, e.g., Archer v. Nissan Motor Acceptance Corp.*, 550 F.3d 506, 508 (5th Cir. 2008) (describing "[t]he ECOA time prescription" as "a statute of repose," as shown by its "sweeping and direct language"); *Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc.*, 764 F.3d 1199, 1234 n.19 (10th Cir. 2014) (same as to FCRA). Similarly, the Truth in Lending Act (TILA), 15 U.S.C. § 1631 *et seq.*, imposes an absolute statute of repose on one of the forms of relief it makes available (rescission). *See id.* § 1635(f); *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 417 (1998).

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1101 *et seq.*, contains a similar statute of repose—though it provides a six-year period in which to sue. *See* 29 U.S.C. § 1113(1). Federal courts treat that provision as "an outside limit" that "serves as an absolute barrier to an untimely suit." *Radford v. Gen. Dynamics Corp.*, 151 F.3d 396, 400 (5th Cir. 1998); *accord, e.g., Moyle v. Liberty Mut. Ret. Ben. Plan*, 823 F.3d 948, 959 n.5 (9th Cir. 2016) (describing this provision as a "statute of repose").

2. Statutes of repose also are common in many state statutory schemes. For example, many states have imposed statutes of repose on claims based on construction defects, typically ranging from five to ten years or more, "from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of [an] improvement" to real property. *E.g.*, N.C. GEN. STAT.

§ 1-50(a)(5)(a) (six-year statute of repose).[5] As those states' courts have said, the purpose of these statutes "is to protect from liability those persons who make improvements to real property." *Bryant v. Don Galloway Homes, Inc.*, 556 S.E.2d 597, 600 (N.C. Ct. App. 2001). If the threat of liability lasted for the often decades-long life of the building (thanks to the discovery rule), it would increase the cost of construction, and might drive some out of the construction industry altogether. Moreover, the statute of repose forecloses litigation at a time "when '[a]rchitectural plans may have been discarded, copies of building codes in force at the time of construction may no longer be in existence, [and] persons individually involved in the construction project may be deceased or may not be located.'" *Klein v. Catalano*, 437 N.E.2d 514, 520 (Mass. 1982) (quoting *Howell v. Burk*, 568 P.2d 214, 220 (N.M. Ct. App. 1977) (alteration in original)).

States employ statutes of repose in other contexts for similar reasons. As Judge Posner noted in *McCann v. Hy-Vee, Inc.*, 663 F.3d 926, 930 (7th Cir. 2011), the argument for absolute limits on liability is "particularly strong in the case of product defects," and for that reason, many states have imposed statutes of repose on product-liability claims that run "from the date of the first sale for use or consumption of the personal property causing or otherwise bringing about the injury." GA. CODE § 51-1-11(b)(2) (ten-

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[5] *See also, e.g.*, MASS. GEN. LAWS ch. 260, § 2B (similar six-year statute of repose for improvements to real property); NEB. REV. STAT. § 25-223 (ten-year repose period for claims of "deficiency in the design, planning, supervision, or observation of construction, or construction of an improvement to real property").

year repose period).[6] States have made similar judgments with respect to professional-malpractice claims,[7] statutory consumer-protection or unfair-and-deceptive-practice claims,[8] and blue-sky-law claims.[9]

B. Statutes of Repose Strike a Careful Legislative Balance to Mitigate the Threat of Long-Pending Contingent Liabilities

The overriding rationale for statutes of repose is simple: "[B]usiness planning is impeded by contingent liabilities that linger indefinitely." *McCann*, 663 F.3d at 930. "There comes a time when [the defendant] ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim" at that point. *Rosenberg v. Town of N. Bergen*, 293 A.2d 662, 667-68 (N.J. 1972). Statutes of repose reflect careful legislative weighing of just how long should be deemed too long, *ex ante*. That is a classically legislative judgment.

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[6] *See also, e.g.*, OR. REV. STAT. § 30.905(2)(a).

[7] *E.g.*, MICH. COMP. LAWS § 600.5838b(1)(b) (six-year statute of repose for legal-malpractice claims); TENN. CODE § 28-3-104(c)(2) (five-year repose period for claims against accountants or attorneys "except where there is fraudulent concealment on the part of the defendant, in which case the action or suit shall be commenced within one (1) year after discovery").

[8] *E.g.*, TENN. CODE § 47-18-110 (five-year statute of repose for consumer-protection claims); WIS. STAT. § 425.307(1) (six-year statute of repose for statutory consumer-protection claims asserted in an affirmative, rather than defensive, posture).

[9] *E.g.*, CAL. CORP. CODE § 25506(b) (five-year statute of repose for private state securities-law claims); TEX. REV. CIV. STAT. art. 581, § 33(H)(2)(b) (same).

Accordingly, where a legislature desires to calibrate a statute of repose to allow more time to sue in certain circumstances, the legislature does so explicitly by means of "legislatively created exceptions"—explicit statutory rules that allow more time to sue in certain circumstances—that (unlike tolling rules courts read into statutory time bars) are "set forth in the statute of repose" itself. 1 CORMAN § 1.1, at 5. For example, ECOA's statute of repose explicitly provides for a limited form of statutory tolling when a governmental plaintiff—but *not* a private plaintiff seeking to be appointed class representative—is pursuing the same claim. 15 U.S.C. § 1691e(f). And ERISA's statute of repose makes special, explicit provision for "fraud or concealment" by a fiduciary defendant, in which case the repose period runs from the discovery of the violation. 29 U.S.C. § 1113.

The statute of repose can be further calibrated by working in tandem with a statute of limitations, as the Securities Act provision at issue here does. In such cases, the statute of repose marks the point beyond which the shorter statute of limitations may not be tolled. If everything that tolled one tolled the other, the longer repose period would be meaningless. In setting the outer limit of repose, Congress can and does weigh the need to allow a reasonable but limited time for the considerations that typically justify tolling of a statute of *limitations*, such as delays in discovering the violation. Thus, for instance, Congress has twice extended the statute of repose for ECOA claims, including one extension expressly for the purpose of providing more time to "develop[ ] and investigat[e] . . . the necessary facts." S. Rep. No. 94-589, at 14 (1976). "Such an accommodation would

have been unnecessary if Congress intended the courts to engraft equitable tolling doctrines onto the statute." *Archer*, 550 F.3d at 508-09. By contrast, Congress *shortened* the repose period at issue here, and thereby limited defendants' exposure to the strict liability imposed by the Securities Act. *See* Securities Exchange Act of 1934, Pub L. No. 73-291, § 207, 48 Stat. 907.

C. This Case Implicates a Wide Range of Statutes of Repose, Because Class-Action Litigation is Common Under the Relevant Statutes

The question presented here implicates the entire spectrum of federal and state statutes of repose, because class actions are common under virtually all of those statutes. A decision extending *American Pipe* tolling to statutes of repose therefore would be felt well beyond the securities context.[10]

Class actions are commonplace under all of the federal consumer-credit statutes, *see* 6 ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 21:1, at 388-90 (4th ed. 2002), and ECOA in particular has recently seen "a wave of putative class action lawsuits." Laura C. Baucus *et al.*, *Emerging Topic*, 64 CONSUMER FIN. L.Q. REP. 155, 157 (2010). Indeed, ECOA even specifies—in the very same provision that includes the statute of repose—that

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[10] Indeed, federal courts have already faced the question whether *American Pipe* tolling applies to statutes of repose under ERISA and TILA. *Compare Arivella v. Lucent Techs., Inc.*, 623 F. Supp. 2d 164, 176-78 (D. Mass. 2009) (ERISA, yes), *with McMillian v. AMC Mortg. Servs., Inc.*, 560 F. Supp. 2d 1210, 1215 (S.D. Ala. 2008) (TILA, no).

plaintiffs may sue on behalf of a class. *See* 15 U.S.C. § 1691e(a); *see also id.* § 1691e(b) (imposing a special cap on damages recoverable in a class action). Yet despite making certain exceptions to the timeliness rules set out in the ECOA and FCRA statutes of repose, Congress created none for class-action plaintiffs. The same is true under ERISA, which has been a frequent subject of class-action litigation in recent years.

State-law class actions also regularly implicate statutes of repose. The construction-related and products-liability statutes of repose discussed above are examples. *See, e.g.*, *Manor v. D.R. Horton, Inc.*, No. 2:14-CV-2222 JCM, 2016 WL 1045484 (D. Nev. Mar. 15, 2016) (addressing a putative class action bringing defective construction claims against the developer of 103 single-family homes).

Even professional malpractice—another area where statutes of repose are well-established—sees its share of class-action litigation, especially in contexts where the malpractice tort is used to pursue securities-related claims against accountants and lawyers. *See, e.g.*, *Johnson v. Nextel Commc'ns, Inc.*, 660 F.3d 131, 134, 137 (2d Cir. 2011); *Piazza v. Ebsco Indus., Inc.*, 273 F.3d 1341, 1347 (11th Cir. 2001); *Ackerman v. Price Waterhouse*, 683 N.Y.S.2d 179, 184-86 (App. Div. 1998).

Thus, petitioner's argument in its broadest form represents a challenge not just to a single statute of repose, but potentially to *all* of the statutes of repose, federal and state, that can collide with class actions. The careful judgment each of those statutes reflects

would be replaced with an across-the-board rule that class actions *always* justify more time.

II. Allowing Class-Action Tolling of Statutes of Repose Would Override Congress's and the States' Legislative Judgments, Violating the Separation of Powers and Depriving Defendants of the Certainty That Statutes of Repose Are Meant to Provide

Extending *American Pipe* tolling to statutes of repose, as petitioner and its *amici* advocate, necessarily would negate the "legislative judgment" those statutes represent: "that defendants should 'be free from liability after the legislatively determined period of time, beyond which the liability will no longer exist and will not be tolled for any reason.'" *CTS Corp.*, 134 S. Ct. at 2183 (quoting 54 C.J.S., *supra*, § 7, at 24). Petitioner contends that Rule 23 allows the courts to set aside that legislative judgment to avoid the inconvenience of multiple filings within the repose period. But Rule 23 does not authorize the judiciary to substitute courts' convenience—much less *plaintiffs'* convenience—for a statutory policy of repose. The Rule does not abridge the substantive right to repose; indeed, neither the Rules Enabling Act nor the separation of powers would *permit* the judiciary to abridge that right by rule.

This Court's decision in *American Pipe* described the tolling it was recognizing as an exercise of the "*judicial* power to toll statutes of limitation in federal court." 414 U.S. at 558 (emphasis added). This was a judicially created rule: the Court focused on prudential considerations in collective litigation, rea-

soning that denying tolling "would deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure." 414 U.S. at 553. The tolling rule, the Court thought, was thus "the rule most consistent with federal class action procedure," *id.* at 554, and was "necessary to ensure effectuation of the purposes of litigative efficiency and economy that [Rule 23] was designed to serve," *id.* at 556.

Such a rule might be thought to coexist with statutes of *limitations*, as *American Pipe* concluded. *See* 414 U.S. at 556-59. Judicially created doctrines like "equitable tolling," *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991), are reasonably commonplace, and this Court concluded that a statute of limitations (specifying the period in which suit ordinarily must be brought) conceivably might be read to coexist with those tolling doctrines. *See American Pipe*, 414 U.S. at 556-59.

But the rule with respect to statutes of *repose* is precisely the opposite. As the Court explained in *CTS Corp.*, "a 'critical distinction' between statutes of limitations and statutes of repose 'is that a repose period is fixed and its expiration will not be delayed by estoppel or tolling.'" 134 S. Ct. at 2187 (quoting 4 Wright & Miller, FED. PRAC. & PROC. § 1056, at 240). A statute of repose like that contained in 15 U.S.C. § 77m thus reflects a judgment that repose justifies dispensing with nonstatutory tolling rules. *Cf. Lampf*, 501 U.S. at 363.

Nothing in Rule 23 purports to override such a judgment. *See* Resp. Br. 32. And neither the Rules Enabling Act nor the separation of powers would

permit a *judicial* override of a federal *legislative* judgment that governs substantive rights, not court procedures.

The Rules Enabling Act is not an open-ended delegation of the legislative power to the Judicial Branch. Rather, it is a limited delegation of Congress's "power to regulate the practice and procedure of federal courts," to the governing bodies of those courts themselves. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1941). Such a delegation is permissible precisely because it is limited; some powers "are strictly and exclusively legislative" and thus "must be entirely regulated by the legislature itself." *Wayman v. Southard*, 23 U.S. 1, 42-43 (1825) (Marshall, C.J.); *see also Mistretta v. United States*, 488 U.S. 361, 387 (1989) (holding that *Sibbach* merely echoed "what had been our view since *Wayman*"). A delegation confers, at most, the power "to make rules *not inconsistent with the statutes or constitution* of the United States." *Sibbach*, 312 U.S. at 10. And for precisely that reason, the Rules Enabling Act forbids the judiciary from "modify[ing] any substantive right." 28 U.S.C. § 2072(b).

What is at issue here plainly is a substantive right, not a matter of procedure. Applying that same principle in the *Erie* context, this Court has long held that timeliness principles that form an "integral part" of a state law must be applied in federal court, and the Federal Rules "do[] not replace such policy determinations." *Walker v. Armco Steel Corp.*, 446 U.S. 740, 752 (1980). That principle applies here with even greater force, because the law here is a *federal* one. And the prohibition of tolling is unquestionably an "integral part" of a statute of repose—it

is what distinguishes such a statute from a statute of limitations. *See CTS Corp.*, 134 S. Ct. at 2183. Having written a federal statute of repose to which petitioner's tolling rule would be antithetical, Congress did not turn around and delegate to the courts the power to undo its legislative judgment through rulemaking, if the courts thought it convenient.

For good reason, therefore, Rule 23 makes no mention of any tolling principle that could supersede a statute of repose. The federal judiciary has "no authority to substitute [its] views for those expressed by Congress in a duly enacted statute," whether through rulemaking or federal-common-lawmaking. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 626 (1978). Yet that substitution is just what petitioner seeks—to swap in the prudential considerations set out in *American Pipe* in place of Congress's contrary decision to preclude tolling by adopting a statute of repose.

III. Long Experience With Abusive Class-Action Practices Refutes Any Argument that "Notice" Can Defeat Repose

Even aside from the impermissibility of applying *American Pipe*'s prudential tolling rule to a statute of repose, the basis for that tolling rule is inapplicable to statutes of repose on its own terms. A statute of repose provides a defendant with certainty. The mere filing of a putative class action does not justify taking away that certainty based on the notion that the class complaint provides notice. And abusive practice under the *American Pipe* rule refutes any claim of notice in any event.

A. The Class Complaint Alone Does Not Provide Defendants with Adequate Notice of the Claims They May Someday Face Under *American Pipe* Tolling

In justifying the tolling of a statute of limitations during the pendency of a putative class action, *American Pipe* emphasized that the class-action complaint "notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." 414 U.S. at 555. The Court reasoned that the class action thereby provides "the essential information necessary to determine both the subject matter and size of the prospective litigation" within the limitations period. *Id.*; *accord Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352 (1983) ("Limitations periods are intended to put defendants on notice of adverse claims . . . but these ends are met when a class action is commenced.").

Notice is not the point of statutes of repose: they seek instead to assure defendants that any claims not properly asserted within the statutory window are never brought, enabling defendants to plan their affairs with certainty. Thus, even assuming that "generic" notice of a claim could be said to satisfy the objectives of a *limitations* period,[11] it certainly does not satisfy the purposes that underlie statutes of *re-*

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[11] "A mere announcement of an intention to sue puts defendants on notice. No one contends, however, that this simple notice is sufficient to toll the statute." *In re Copper Antitrust Litig.*, 436 F.3d 782, 796 (7th Cir. 2006).

pose. Statutes of repose are not enacted with a view to ensuring that defendants are "notifie[d] . . . of the number and generic identities of the potential plaintiffs who may participate in the judgment" later on. *American Pipe*, 414 U.S. at 555. Rather, they are meant to give defendants a date certain by which their liability for certain acts will come to an end, so that defendants can plan their affairs accordingly.

These purposes simply are not served by a "generic" notification that some indeterminate number of claimants are waiting in the wings, ready to take the stage if the putative class action falters or a class member decides to opt out (which could come many years after the repose period has lapsed)—and perhaps even sooner. *See, e.g.*, *In re WorldCom Sec. Litig.*, 496 F.3d 245, 254 (2d Cir. 2007) (holding that *American Pipe* tolling "applies also to class members who file individual suits before class certification is resolved"); *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1009 (9th Cir. 2007) (same). Not only is the defendant receiving such "notice" left unsure about when his potential exposure will terminate, but the class action in many cases will not even provide an accurate picture of whose claims, and how many, lie over the horizon.

American Pipe tolling, after all, rests on the notion that the defendant is on notice of the claims of everyone in the putative class, up until class certification is denied.[12] *Crown, Cork*, 462 U.S. at 354. But class

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[12] Of course, it may end earlier if, *e.g.*, the case does not survive to the class-certification stage. *See Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560, 563 (7th Cir. 2011) ("Tolling lasts from the day a class claim is asserted until the

certification is often denied *precisely because* the class definition—the very thing that under *American Pipe* is supposed to provide defendants with "essential information" about their liability exposure—*is inadequate to identify who is within the class and who is not. E.g., Carrera v. Bayer Corp.*, 727 F.3d 300, 312 (3d Cir. 2013) (vacating class certification because members of class were not ascertainable); *Adashunas v. Negley*, 626 F.2d 600, 603-05 (7th Cir. 1980) (same). At most, such class definitions can only hint at defendants' potential exposure. A defendant may know, for example, how many products it sold, and to whom, but may have few means of determining which of their customers (if any) could have suffered the complained-of injury. In such cases, petitioner's rule would leave defendants in great doubt about whether they will be forced to defend old claims (and how many and for how much), even where the legislature, by including a statute of repose, crafted the cause of action to provide certainty and peace on a certain date.

Furthermore, even aside from the inadequacy of the class *definition* recited by the plaintiffs as a source of notice to defendants, the class *claims* may not mark the outer limit of *American Pipe* tolling. Aggressive plaintiff's counsel regularly rely on *American Pipe* to assert claims after a limitations period has run, even though those claims appear *nowhere* in

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day the suit is conclusively not a class action[.]"); *cf. Edwards v. Boeing Vertol Co.*, 717 F.2d 761, 766 (3d Cir. 1983) ("[T]olling of the statute of limitations continue[s] until a final adverse determination of class claims."), *vacated on other grounds*, 468 U.S. 1201 (1984).

the original complaint. Significant new issues, theories, and potential liabilities can thereby be smuggled into a case despite the time bar.

The differences can be dramatic. For instance, the court below has at least twice allowed new claims seeking *treble* damages to be added after the limitations period has run, even though the original class-action complaint did not contain any claim that permitted recovery of treble damages. *See, e.g., Benfield v. Mocatta Metals Corp.*, 26 F.3d 19, 23 (2d Cir. 1994) (allowing a plaintiff to add an otherwise-untimely RICO claim based on *American Pipe* tolling, even though the original class-action complaint contained no RICO claims and "RICO requires more in the way of evidence" than the claims pleaded in that original complaint); *Cullen v. Margiotta*, 811 F.2d 698, 720-21 (2d Cir.) (similar), *overruled on other grounds by Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987). The court of appeals held that adding new claims that changed the "degree of exposure to liability (single damages vs. treble damages plus attorneys' fees)" was not a significant difference. *Cullen*, 811 F.2d at 721. That reasoning is untenable in the context of a statute of repose: understanding the exposure to liability on the repose date is *precisely* what a statute of repose is supposed to accomplish.[13]

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[13] Other courts of appeals have applied *American Pipe* tolling more narrowly, limiting it to causes of action that are identical to those alleged in the putative class-action complaint. *E.g., Williams v. Boeing Co.*, 517 F.3d 1120, 1136 (9th Cir. 2008). That reasoning is more consistent with Justice Powell's admonition that *American Pipe* tolling should not "leave[ ] a plaintiff free to raise different or peripheral claims following denial of

B. Abusive Applications of *American Pipe* Tolling Can Compound the Potential Unfairness to Class-Action Defendants

The concerns discussed above are only further compounded by longstanding disagreement over the scope of *American Pipe*'s tolling rule, which has led to a number of abusive applications of the rule. That was not unforeseen: concurring in *American Pipe* itself, Justice Blackmun warned that the Court's decision "must not be regarded as encouragement to lawyers in a case of this kind to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights," and encouraged district judges to "prevent th[at] type of abuse." 414 U.S. at 561-62. Justice Powell echoed those warnings in *Crown, Cork*, adding that "[t]he tolling rule of *American Pipe* is a generous one, inviting abuse." 462 U.S. at 354. Unfortunately, some class-action attorneys have come to regard *American Pipe*'s tolling rule as precisely the sort of "encouragement" that these Justices sought to forestall.

1. *Placeholder Plaintiffs*: Class-action lawyers have too often made use of "placeholder" suits: suits by plaintiffs who are named in the complaint to represent a putative class, but who in fact have no

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class status." *Crown, Cork*, 462 U.S. at 354. The lack of consensus as to the scope of *American Pipe*'s tolling rule is itself an important source of uncertainty for defendants as to the temporal duration of their liabilities—uncertainty that is anathema to statutes of repose and the reasons for them.

standing or are otherwise unsuited to assert the class members' claims. These "placeholders" serve primarily to buy time until a more suitable class representative can be substituted. That is why some placeholder complaints are filed literally on "the last day of the statute of limitations period." *Hill v. State St. Corp.*, No. 09-cv-12146-NG, 2011 WL 3420439, at *25 (D. Mass. Aug. 3, 2011).

The federal courts have failed to reach consensus as to the permissibility of such tactics, creating uncertainty that itself undermines the purpose of statutes of repose. To their credit, many federal courts have rightly rejected these efforts as abuses of *American Pipe*'s already "generous" tolling rule, and refused to allow tolling. *See, e.g.*, *In re Crazy Eddie Sec. Litig.*, 747 F. Supp. 850, 856 (E.D.N.Y. 1990) ("There appears to be no good reason to encourage bringing of a suit merely to extend the period in which to find a class representative."); *In re Elscint, Ltd. Sec. Litig.*, 674 F. Supp. 374, 378 (D. Mass. 1987) (recognizing that to permit tolling where named plaintiffs lack standing "may condone or encourage attempts to circumvent the statute of limitation by filing a lawsuit without an appropriate plaintiff and then searching for one who can later intervene with the benefit of the tolling rule").[14] Other federal courts appear to adopt a categorical ban on tolling where the named plaintiff lacked standing, which serves the same function of curbing abuse.

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[14] *Accord N.J. Carpenters Health Fund v. DLJ Mortg. Capital, Inc.*, No. 08 Civ. 5653 (PAC), 2010 WL 6508190, at *2 n.1 (S.D.N.Y. Dec. 15, 2010); *Kruse v. Wells Fargo Home Mortg., Inc.*, No. 02-CV-3089 (ILG), 2006 WL 1212512, at *5-6 (E.D.N.Y. May 3, 2006).

See, e.g., Boilermakers Nat'l Annuity Trust Fund v. WaMu Mortg. Pass Through Certificates, Series AR1, 748 F. Supp. 2d 1246, 1258-59 (W.D. Wash. 2010); *Palmer v. Stassinos*, 236 F.R.D. 460, 465-66 & n.6 (N.D. Cal. 2006).

Even so, not every federal court has heeded Justice Blackmun's and Justice Powell's admonitions. Indeed, in allowing tolling where the named plaintiffs lacked standing, one court has gone so far as to say that there is nothing "singular or peculiar with respect to 'standing' that would generally prevent the application of the [efficiency-based] consideration expressed in *American Pipe*." *Rose v. Ark. Valley Envtl. & Util. Auth.*, 562 F. Supp. 1180, 1193 (W.D. Mo. 1983).[15] Others have taken a similar view, out of vague, largely anecdotal concerns that any doubts about the named plaintiff's standing might threaten the efficacy of *American Pipe* tolling, by leading class members to flood the docket with protective filings.[16]

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[15] In a similar vein, two courts of appeals have allowed *American Pipe* tolling where the named plaintiff was later found to lack standing, at least where the class had already been certified and notice sent to the class members. *See Griffin v. Singletary*, 17 F.3d 356, 357, 360-61 (11th Cir. 1994); *Haas v. Pittsburgh Nat'l Bank*, 526 F.2d 1083, 1095-98 (3d Cir. 1975).

[16] *See, e.g., Genesee Cnty. Emps.' Ret. Sys. v. Thornburg Mortg. Sec. Trust 2006-3*, 825 F. Supp. 2d 1082, 1161-64 (D.N.M. 2011); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 352 F. Supp. 2d 429, 456 (S.D.N.Y. 2005), *abrogated on other grounds*, 574 F.3d 29 (2d Cir. 2009). Still others have tried to stake out a middle ground, allowing tolling where class members arguably had some reasonable basis for believing the named plaintiff had standing, or where the named plaintiff's standing "was neither 'straightforward' nor 'well settled,'" but rejecting it where "the purported class representative so clearly lacks standing that allowing [tolling] would condone (and even invite) the filing of

In other words, these courts have allowed efficacy considerations to trump the statute: even though the original class-action complaint was filed by a mere placeholder who did not share any injury (or the relevant injury) with the putative class, these courts nonetheless have deemed it preferable to tolerate such abuses than to have the plaintiffs with standing file their own timely complaints.

The upshot of these discordant approaches is that class-action lawyers, often enough, can get away with relying on placeholder plaintiffs and broad class definitions, effectively allowing them to extend the otherwise-applicable time limits for as long as the placeholder class definition remains pending. That may well end up being long after the statute of repose would otherwise have run, allowing absent class members extra time to bring claims that the statute was supposed to have cut short.

2. *"Stacked" Class Actions*: The problem is further exacerbated by the phenomenon of "stacked" class actions: when a putative class action is dismissed or denied certification, members of that failed class bring not just their own individual cases, but *a new putative class action*. The goal is generally to seek a different result from a different judge. *See, e.g., Basch v. Ground Round, Inc.*, 139 F.3d 6, 11-12 (1st Cir. 1998).

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placeholder lawsuits." *Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, 894 F. Supp. 2d 144, 156 (D. Mass. 2012); *In re Morgan Stanley Mortg. Pass-Through Certificates Litig.*, 810 F. Supp. 2d 650, 670 (S.D.N.Y. 2011).

Here, too, the federal courts are divided. The Third Circuit allows tolling so long as the prior class action "was not rejected because of any defects in the class itself but because of [the named plaintiff's] deficiencies as a class representative." *Yang v. Odom*, 392 F.3d 97, 108 (3d Cir. 2004) (citation omitted). More recently, the Sixth Circuit allowed tolling for a successive class action simply because the district court never reached the class-certification issue. *In re Vertrue Inc. Mktg. & Sales Practices Litig.*, 719 F.3d 474, 479 (6th Cir. 2013). Other courts hold to the contrary that "potential individual plaintiffs cannot extend th[e] limitations period by relying on successive class actions which allege the same class and the same claims." *Basch*, 139 F.3d at 12; *accord Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir. 1987); *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir. 1985).

Both practices—placeholder plaintiffs and stacked class actions—stem from a longstanding lack of clarity in the federal courts concerning the scope of *American Pipe*'s tolling rule, and raise the very real possibility of unlimited tolling. Too often, courts applying *American Pipe* have approved tactics that would allow a succession of suits, even wholly inadequate placeholder suits, to toll the time limit "perpetually." *Basch*, 139 F.3d at 11. Combined, the lack of doctrinal clarity and the abusive applications of *American Pipe* that arise from it critically undermine certainty for defendants. But where, as here, that certainty is guaranteed by a statute of repose, this Court can prevent any such abuses simply by applying the outer limit that Congress wrote, and holding that the

American Pipe doctrine—however construed—cannot override the statute of repose.

IV. Declining to Extend the Tolling Doctrine to Statutes of Repose Will Not Overwhelm Court Dockets or Prevent Adjudication of Legitimate Claims

Much of petitioner's argument rests on the result-driven notion that *American Pipe* tolling *must* apply to repose periods. Petitioner claims that the supposed need to file protective parallel complaints would create a "logistical and risk management nightmare for courts and defendants," apparently because Section 13's three-year repose period is too short—and securities class-action litigation takes too long—for putative class members to wait until the fate of the class action is decided before deciding whether to opt out. Pet. Br. 22-25; *see also* Institutional Investors' Br. 15-24; Washington Br. 13; Directors' Br. 11-15; Profs.' Br. 5-15; Judges' Br. 7-14.

To be sure, the tolling rule this Court adopted in *American Pipe* was animated by a concern that denying tolling there "would deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure." 414 U.S. at 553. Even so, the Court recognized that its authority to grant tolling extended no further than what was "consonant with the legislative scheme." *Id.* at 558. Here, as explained, tolling is simply incompatible with a "legislative scheme" that includes a statute of repose. And even if this Court were free to craft petitioner's contrary rule—irrespective of the text of the statute of repose, the contents of Rule 23, and the

constraints of the Rules Enabling Act—petitioner's submission rests on a flawed analysis.

A. *IndyMac* Has Not Led to an Unworkable Surge of Protective Filings

The most obvious flaw with the petitioner's assertion that the *IndyMac* rule will produce an unworkable surge of protective filings is also the most straightforward: In the years since this Court dismissed the *IndyMac* petition as improvidently granted, petitioner's inefficiency theory has been tested and found wanting.

It has now been more than three years since the Second Circuit held in *IndyMac* that *American Pipe* tolling does not apply to 15 U.S.C. § 77m's statute of repose, and the Sixth and Eleventh Circuits have since adopted that same holding. *IndyMac*, 721 F.3d 95; *Stein*, 821 F.3d 780; *Dusek*, 832 F.3d 1243. Yet there is no evidence whatsoever that these decisions have produced the unmanageable flurry of protective filings and duplicative litigation that petitioner says is the inevitable result of that rule. Indeed, there is no evidence that the decisions have caused any problems whatsoever. Two of petitioner's *amici* point to a *single* case in which some number of protective filings were made—the *Petrobras Securities Litigation* case—and there is no indication that those filings caused any concrete problem even there. *See* Institutional Investors Br. at 15-16; Washington Br. at 13. Nor is it even clear that these filings were the result of the *IndyMac* rule, as plaintiffs may choose to opt-out for any number of other reasons.

Thus, despite the fact that the *IndyMac* rule has been tried and has succeeded, academic *amici* submit here the same analysis of federal-court securities class actions filed between 2002-2009 that they submitted in *IndyMac*. Profs.' Br. 5-16.

In an effort to justify their reuse of this stale and empirically contradicted analysis, the professors argue that *IndyMac* was limited to a particular cause of action, and that this, together with a circuit split, has meant that litigants "would have been uncertain as to whether they would enjoy *American Pipe*'s protection if class certification were denied." *Id.* at 17. They also argue that there is limited post-*IndyMac* data. *Id.* at 18-20. But each of those arguments fails to overcome the clear, contrary experience in the Second Circuit in the years since *IndyMac*.

As for litigants' supposed "uncertain[ty] as to whether they would enjoy *American Pipe*'s protection," *id.* at 17, that would be expected to produce *more* protective filings, not fewer. Litigants so concerned about protecting their rights that they would make protective filings in case class certification were denied would surely also make protective filings in case this Court upholds the *IndyMac* rule. Yet there is no evidence that they have done so in any meaningful numbers.

As for the supposed lack of data, the professors concede that there are dozens of pending class actions in which the effects of *IndyMac* can be observed as to at least some portion of the class. *Id.* at 18-19. Yet the professors offer no evidence that the rule has produced any surge in protective filings, much less an unworkable one. To the contrary, as respondents

have explained, there has been no surge in filings at all. Resps.' Cert. Opp. 19-22.

B. The Professors' 2002 to 2009 Study Fails to Address the Relevant Question—The Time From Filing to Class Certification Decision

Moreover, even setting aside the contrary real-world evidence, the professors' analysis of the 2002 to 2009 data does not provide a complete picture of why the claims that are the focus of their analysis are at risk of being time-barred without tolling of the repose period. The professors' figures show only (1) the date when the class action complaint was filed, and (2) how long it took to reach a dismissal or certification ruling from the date when the repose period first started running. Profs.' Br. 7. What that presentation leaves obscured, however, is how long it actually took the *federal court* to rule on dismissal or class certification *after the class-action complaint was filed*. In other words, the professors' analysis does not differentiate between class members whose time ran out because the district judge took too long, and those whose time ran out only because the named plaintiff—and indeed, the absent class member himself—simply waited too long to file in the first place.

At least one study suggests that, in most cases, federal courts are not taking too long to dispose of securities class actions. That study, comprising all federal-court securities class actions filed between 2000 and 2016, found that: (1) the vast majority, 72 percent, were dismissed or settled before any motion for class certification was filed; (2) of the minority of

cases in which a class certification motion was filed, only 55 percent reached a decision on that motion; (3) "[a]pproximately 64% of the decisions on motions for class certification that were reached were within three years from the original filing date of the complaint"; and (4) "[t]he median time was about 2.5 years." STEFAN BOETTRICH & SVETLANA STARYKH, RECENT TRENDS IN SECURITIES CLASS ACTION LITIGATION: 2016 FULL-YEAR REVIEW 21-23 (Jan. 2017), goo.gl/o7S0zT.[17]

In sum, there is no evidence that the *IndyMac* rule has in fact proved problematic in the years since the Second Circuit adopted it in *IndyMac*. And federal courts in the vast majority of recent securities class actions disposed of motions to dismiss or for class certification with time to spare on the statute-of-repose clock. In the Securities Act context, that time, even if only a little less than a year in most cases, should be adequate for class members deciding whether to opt out, considering that (1) the statute already expects fast action from plaintiffs, who are in any event required to bring claims under Section 11 or 12(a)(2) of the Securities Act "within one year after the discovery of the untrue statement or the omission," 15 U.S.C. § 77m; (2) plaintiffs need not start from scratch, but can conduct their own investigation with the benefit of the work the named plaintiffs counsel has already done; and (3) plaintiffs, in many jurisdictions, need not wait for class

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[17] The same study reports that the median "time to resolution," *i.e.*, "the time between filing of the first complaint and resolution (whether settlement or dismissal)," for federal-court securities class actions has "declined by more than 10%" during the past decade, and is now 2.4 years. *Id.* at 27.

certification to be denied before filing in order to reap the benefit of *American Pipe* tolling of the applicable limitations period, and thus have plenty of time in which to file no matter how long a certification decision takes. *See Hanford Nuclear*, 534 F.3d at 1009; *WorldCom*, 496 F.3d at 255.

C. Allowing Tolling Would Undermine Other, Longer Repose Periods, Not Just the Securities Act Period

Moreover, even assuming that the Securities Act's repose period creates special problems—and there is no clear evidence that it does—it is not at all apparent that similar difficulties exist under other statutes of repose in the mine-run of federal-court class-action litigation. As noted, many statutes of repose at both the federal and state level, *see* Part I.A, are significantly longer than the one at issue here. For blue sky, professional malpractice, and consumer protection claims (as well as breach-of-fiduciary-duty claims under ERISA), five- or six-year periods are typical.[18] With construction-defect and product-liability claims, ten-year periods also are common.[19]

Studies confirm that these periods are long enough to afford putative class members considering whether to opt out a meaningful opportunity to do so. For example, a 2012 study examined federal-court, federal-question class actions filed or removed between 2003 and 2007. *See* Thomas E. Willging & Emery G.

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[18] *E.g.*, 15 U.S.C. § 1681p(2); 29 U.S.C. § 1113; CAL. CORP. CODE § 25506(b); MICH. COMP. LAWS § 600.5838b(1)(b).

[19] *E.g.*, NEB. REV. STAT. § 25-223; OR. REV. STAT. § 30.905(2)(a); *but see* MASS. GEN. LAWS ch. 260, § 2B.

Lee III, *Class Certification and Class Settlement: Findings from Federal Question Cases, 2003-2007*, 80 U. CIN. L. REV. 315, 316-26 (2012). The authors found that for cases originally filed in federal court (excluding Fair Labor Standards Act collective actions), those that did not end in settlement ended in a median of "about 9.3 months." *Id.* at 328, 344. Those that were settled "took a median time of . . . about 20.9 months." *Id.* The picture was much the same for federal-question class actions removed to federal court: those that were not remanded (typically, within 3.7 months) terminated within "about 9.9 months" in cases that were not settled, about 24.6 months in cases that were. *Id.*

These findings are largely consistent with those of a 2008 study, by the same authors, of 231 federal-court diversity class actions filed between 2003 and 2005. *See* EMERY G. LEE III & THOMAS E. WILLGING, IMPACT OF THE CLASS ACTION FAIRNESS ACT ON THE FEDERAL COURTS: PRELIMINARY FINDINGS FROM PHASE TWO'S PRE-CAFA SAMPLE OF DIVERSITY CLASS ACTIONS 1, 17-18 (2008), goo.gl/HXzf0B. That study found that of those cases that were not remanded, after a median of about 3.5 months: (1) the median time for voluntary dismissals was 9 months; (2) the median time to disposition by "motion, sua sponte order, or summary judgment" was 14 months; and (3) the median time to class settlement was 18.4 months. *Id.* at 7.

Against a statute of repose that allows ten, five, or even three years to sue, the one or two years necessary to dispose of many class actions leaves ample time to make an informed choice whether to opt out. *Cf. Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 134

S. Ct. 604, 612 n.4 (2013) (concluding that plaintiff who must spend "15 to 16 months" exhausting administrative remedies out of a three-year contractual limitations period "still [has] ample time for filing suit"). To the extent that time still proves insufficient, in all likelihood that will most often be a function of delay in filing suit in the first place, not of delay in case management.

D. Repose Periods Are a Legislative Judgment So Any Changes Should Be Left to Congress

In any event, even assuming for the sake of discussion (and contrary to all evidence) that a three-year statute of repose is too short to accommodate the realities of federal-court securities-class-action practice in the absence of *American Pipe* tolling, that is a legislative question, not a judicial one. *See Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975). Congress is perfectly free to lengthen the repose period if it wishes; indeed, Congress has acted to lengthen statutes of repose at least twice in recent memory, including in the securities context. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 804(a), 116 Stat. 745, 801 (inserting what is now 28 U.S.C. § 1658(b)(2), providing five-year statute of repose for securities fraud claims);[20] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1085(7), 124 Stat. 1376, 2085 (2010) (lengthening ECOA's statute of repose to five years).

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[20] The statute of repose for such claims previously was three years. *See Lampf*, 501 U.S. at 364 n.9 (citing 15 U.S.C. § 78i(e)).

The Securities Act, of course, has a three-year statute of repose precisely because Congress previously adopted a much longer repose period, thought better of it, and amended the statute to shorten it. Congress selected three years as the "reasonable time" after which a corporate officer need no longer fear liability. 78 Cong. Rec. 8198 (May 7, 1934) (statement of Sen. Fletcher). And in the years since *Indymac Bank*, Congress has not chosen to lengthen the repose period or to provide for tolling by statute. Arguments that Congress chose too short a time to suit the interests of class-action plaintiffs should be addressed to that body, not to this Court.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

BRIAN E. PASTUSZENSKI
DANIEL P. ROESER
GOODWIN PROCTER LLP
620 Eighth Avenue
New York, NY 10018

KATE COMERFORD TODD
STEVEN P. LEHOTSKY
JANET GALERIA
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

WILLIAM M. JAY
Counsel of Record
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
wjay@goodwinlaw.com
(202) 346-4000

STEPHEN D. POSS
DAVID R. FOX
GOODWIN PROCTER LLP
100 Northern Ave.
Boston, MA 02210

Counsel for Amicus Curiae

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF CIVIL PROCEDURE AND SECURITIES LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DAVID FREEMAN ENGSTROM
Lead Amicus Curiae and Counsel of Record
Stanford Law School
559 Nathan Abbott Way
Stanford, CA 94305
(650) 721-5859
(dfengstrom@law.stanford.edu)

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

I. AVAILABLE EMPIRICAL EVIDENCE SUGGESTS THAT LIMITING *AMERICAN PIPE*'S REACH WILL RESULT IN SUBSTANTIAL NUMBERS OF WASTEFUL PROTECTIVE FILINGS 5

A. Research Design 5

B. Results 7

C. Discussion 11

II. SOUND PRINCIPLES OF RESEARCH DESIGN COUNSEL AGAINST A "NATURAL EXPERIMENT" APPROACH OR A NARROW FOCUS ON OPT-OUTS IN MEASURING THE EFICIENCY COSTS OF A DECISION LIMITING *AMERICAN PIPE*'S REACH 16

A. The Challenges of an Ideal "Natural Experiment" Approach to Measuring Protective Filings 16

B. Respondents' Misplaced Reliance upon "Opt-Out" Studies 20

III. LIMITING *AMERICAN PIPE*'S REACH WOULD NOT YIELD ANY COUNTERVAILING BENEFIT 22

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) 13

Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974) ..... *passim*

Arnold v. KPMG LLP, 334 F. App'x 349 (2d Cir. 2009) 10

Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) 14

Dusek v. JPMorgan Chase & Co., 832 F.3d 1243 (11th Cir. 2016) 17

Foley v. Transocean Ltd., 272 F.R.D. 126 (S.D.N.Y. 2011) 23

Griffin v. Singletary, 17 F.3d 356 (11th Cir. 1994) 12

Hilgeman v. Nat'l Ins. Co. of America, 547 F.2d 298 (5th Cir. 1977) 18

In re Exxon Mobil Corp. Sec. Litig., 500 F.3d 189 (3d Cir. 2007) 10

In re Fed. Fountain, Inc., 165 F.3d 600 (8th Cir. 1999) 18

In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305 (3d Cir. 2008) 15

In re New Motor Vehicles Can. Exp. Antitrust Litig., 522 F.3d 6 (1st Cir. 2008) 15

Joseph v. Wiles, 223 F.3d 1155 (10th Cir. 2000) 17

McCann v. Hy-Vee, Inc., 663 F.3d 926 (7th Cir. 2011) 10

Police & Fire Ret. Sys. of Detroit v. IndyMac MBS, Inc., 721 F.3d 95 (2d Cir. 2013) ..... *passim*

Ritter v. Zuspan, 451 F. Supp. 926 (E.D. Mich. 1978)..... 18

SEC v. Ross, 504 F.3d 1130 (9th Cir. 2007)..... 18

SEC v. Sharef, 924 F. Supp. 2d 539 (S.D.N.Y. 2013)..... 18

SRM Global Master Fund Ltd. P'ship v. Bear Stearns Cos., 829 F.3d 173 (2d Cir. 2016) .8, 17, 21

Stein v. Regions Morgan Keegan Select High Income Fund, Inc., 821 F.3d 780 (6th Cir. 2016)..... 17

United Liberty Life Ins. Co. v. Ryan, 985 F.2d 1320, 1330 (6th Cir. 1993)..... 18

Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011) 15

STATUTES AND RULES

17 C.F.R. § 240.10b-5 (SEC Rule 10b-5) .....*passim*

28 U.S.C. § 1658(b) 6, 8, 10, 17

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Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 23

§ 101(b), 15 U.S.C. § 78u-4 23

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§ 12, 15 U.S.C. § 77*l* .....*passim*

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors whose scholarship and teaching focus on civil procedure and/or the federal securities laws. *Amici* have devoted substantial parts of their professional careers to studying those subjects, including conducting theoretical and empirical analyses of how different procedural orderings shape enforcement of the securities laws and other litigation and regulatory schemes.

This brief reflects the consensus of the *amici* that this Court should reverse the Second Circuit's decision and hold that the rule announced in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), protects petitioner from the three-year time-bar in § 13 of the Securities Act. *Amici* are as follows:

Professor Janet C. Alexander is the Frederick I. Richman Professor of Law, Emerita at Stanford Law School.

Professor Stephen B. Burbank is the David Berger Professor for the Administration of Justice at the University of Pennsylvania Law School.

Professor Kevin M. Clermont is the Robert D. Ziff Professor of Law at Cornell Law School.

Professor John C. Coffee, Jr., is the Adolf A. Berle Professor of Law at Columbia Law School.

Professor James D. Cox is the Brainerd Currie Professor of Law at Duke University School of Law.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* represents that all parties have consented to the filing of this brief and/or have filed with the Court a blanket consent authorizing such a brief.

Professor Scott Dodson is a Professor of Law and the Harry & Lillian Hastings Research Chair at the University of California Hastings College of the Law.

Professor David Freeman Engstrom is a Professor of Law and the Bernard D. Bergreen Faculty Scholar at Stanford Law School.

Professor Jonah B. Gelbach is a Professor of Law at the University of Pennsylvania Law School.

Professor Norman W. Spaulding is the Nelson Bowman Sweitzer and Marie B. Sweitzer Professor of Law at Stanford Law School.

Professor A. Benjamin Spencer is the Earle K. Shawe Professor of Law at the University of Virginia School of Law.

SUMMARY OF THE ARGUMENT

In *American Pipe* and its progeny, this Court wisely rationalized class action law and policy under Rule 23 by tolling applicable limitations periods and thus ensuring that asserted class members need not file protective actions to avoid being time-barred in the event class certification is subsequently denied or the original filer turns out to be a flawed class representative. Tolling thus avoids putting injured parties to an unnecessary and unfair Hobson's choice: file a costly and duplicative action or risk surrendering their rights.

The Court's wise approach is now under assault by a series of decisions in the Second Circuit, including the decision below, that threatens to undo the *American Pipe* rule across the waterfront of federal securities laws. Virtually all federal securities causes of action have a two-tiered time bar: a shorter statute of limitations period governed by a discovery rule, and a longer limitations period running from the violation that is sometimes referred to as a "statute of repose."

The Second Circuit's approach, in contrast to the Tenth Circuit's, renders *American Pipe*'s protective rule inapplicable to these latter "repose" periods.

This brief offers a conceptual and empirical analysis of a key issue that overhangs the case: the plausible quantity of wasteful protective filings—including interventions and separately filed lawsuits—that putative class members might make if the Court were to hold that *American Pipe* tolling does not apply to repose periods.[2]

In Part I, we present the results of an empirical study designed to measure the efficiency toll of a decision by the Court limiting *American Pipe*'s reach using data drawn from a comprehensive dataset of securities lawsuits. We count the number of cases in which class certification proceedings overrun repose periods. These are cases for which a narrowing of *American Pipe*'s reach plausibly *could* induce putative class members to make protective filings, whether in the form of interventions or newly filed lawsuits. We estimate that the Second Circuit's approach restricting *American Pipe*'s reach could, if allowed to stand by this Court, induce putative class members to make protective filings in nearly *half* of securities class actions that reach a court order on class certification and at least *one-quarter* of all filed securities class actions. Of course, not all cases in which class certification proceedings extend beyond the repose period would yield protective filings. But simple math shows that, even if protective filings are made in only a small share of cases where they are possible, the ultimate result

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[2] A parallel version of the analysis offered herein appears in David Freeman Engstrom & Jonah B. Gelbach, American Pipe *Tolling, Statutes of Repose, and Protective Filings: An Empirical Study*, 69 Stan. L. Rev. Online 92 (2017).

would be a substantial spike in litigation in the federal courts.

In Part II, we discuss an alternative approach—the "natural experiment" approach used in the social sciences and in empirical legal studies scholarship—to estimating the expected number of protective filings. As we explain, the obstacles to such an approach make it unworkable in the present context. We also point to significant flaws in the primary study which respondents cite in their effort to blunt the concern that denying application of *American Pipe* tolling to repose periods would uncork a substantial flow of protective filings.

In Part III, we explain why the ruled adopted by the Second Circuit limiting *American Pipe*'s reach yields no countervailing benefit. In other words, the efficiency toll if the Court were to adopt the Second Circuit's position limiting *American Pipe*'s reach is not only likely to be significant, but also entirely unnecessary.

Taken together, our analysis makes clear that the Court's affirmance of the Second Circuit's approach risks undermining the core purposes of the *American Pipe* rule: to promote the "efficiency and economy of litigation." *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974).

ARGUMENT

I. AVAILABLE EMPIRICAL EVIDENCE SUGGESTS THAT LIMITING *AMERICAN PIPE*'S REACH WILL RESULT IN SUBSTANTIAL NUMBERS OF WASTEFUL PROTECTIVE FILINGS

A. Research Design

In this Part, we measure the likely efficiency toll of a decision by the Court limiting *American Pipe*'s reach. We use historical data to count the number of securities class actions producing an order on a motion for class certification in which the court's order granting or denying certification—or, in cases producing multiple certification orders, the last such order—came only after the applicable limitations period had expired.[3] More specifically, we calculate the elapsed number of days between the first day of the class period specified in the operative complaint during class certification proceedings and either: (i) the date of the district court's order on a motion for certification (or, in multi-certification-order cases, the last certification order); or (ii) the date of the district court's order preliminarily approving the settlement class.[4] This calculation permits us to tally the number of cases in which

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[3] *Amici* first presented the empirical analysis that follows to the Court in an *amicus* brief that they filed in *Police & Fire Retirement System of City of Detroit v. IndyMac MBS, Inc.* before the Court's dismissal of the case as improvidently granted, 135 S. Ct. 42 (2014). *See* Br. of Civil Procedure and Securities Law Professors as *Amici Curiae* Supporting Pet., *IndyMac* (No. 13-640).

[4] Keying this calculation to the start of the class period is consistent with § 13's language, which states that the limitations period begins to run when the security was "bona fide offered to the public" (§§ 11 and 12(a)(1) claims) or upon the security's "sale" (§ 12(a)(2) claims). 15 U.S.C. § 77m.

one or more putative class members would have needed, in the absence of tolling, to take protective action in order to preserve the right to proceed if class certification were later denied.

We constructed two datasets from a comprehensive database of securities case filings[5] for the period 2002-2009.[6] One data set contains all cases asserting only claims under §§ 11 or 12 of the Securities Act over that period (as in this case); there were 86 such cases. The other contains cases asserting claims under § 10(b) of the Securities Exchange Act and SEC Rule 10b-5, whether or not those cases also asserted other types of claims (including claims under §§ 11 and 12) filed during the same period; there were roughly 1200 § 10(b) cases filed during 2002-2009, from which we drew a random sample of 500 cases for analysis. We isolate cases asserting only §§ 11 and 12 claims because those claims are subject to the three-year limitations period in § 13 of the Securities Act,[7] while § 10(b) claims are subject to a five-year limitations period.[8]

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[5] Stanford Securities Litigation Analytics, which comprehensively tracks federal securities class actions, graciously provided data. *See* https://sla.law.stanford.edu/ (last visited Mar. 3, 2017). SSLA also provided the data for the analysis performed in Part II, *infra*.

[6] We used 2002 as the front-end of our study window because data were not available for cases filed earlier; we used 2009 as our window's back-end because, at the time the data were collected, it was the most recent year for which nearly the entire inventory of filed cases had been conclusively resolved, thus permitting a clean assessment of whether each sample case yielded a certification order beyond the limitations period.

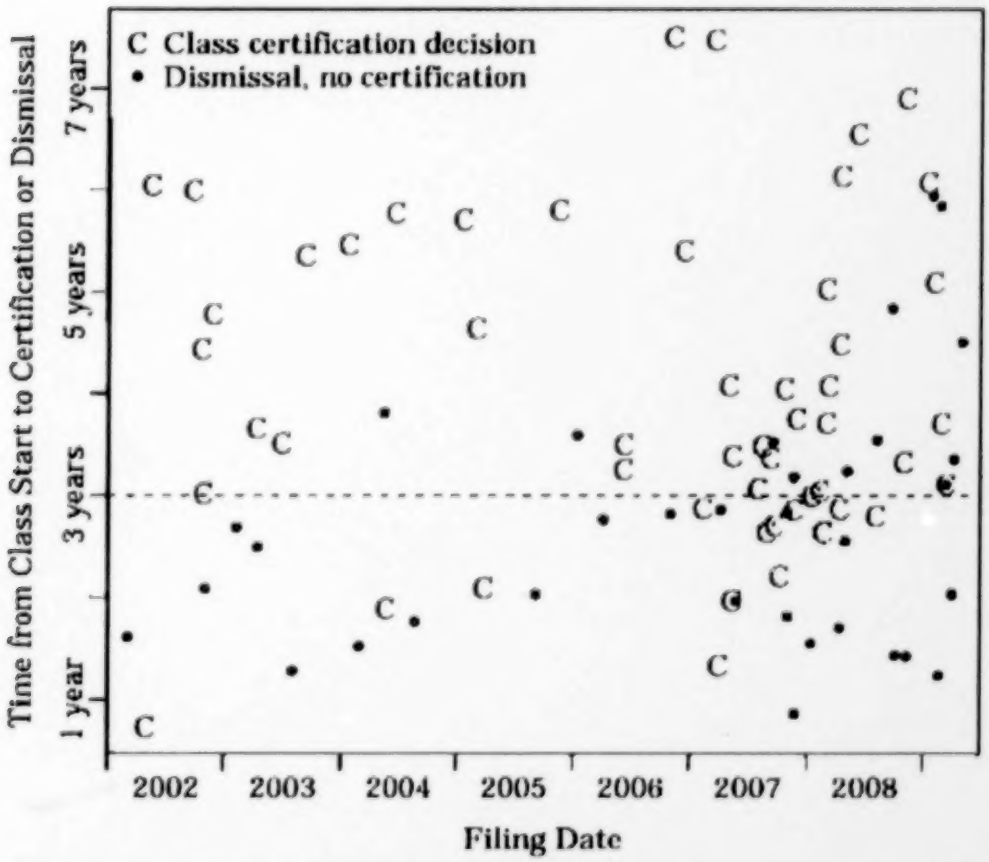
[7] 15 U.S.C. § 77m.

[8] 28 U.S.C. § 1658(b).

B. Results

Figure 1 offers a graphical summary of an analysis of the 86 securities class actions filed during 2002-2009 asserting claims only under §§ 11 or 12 and thus subject to the three-year period of Securities Act § 13, 15 U.S.C. § 77m.

FIGURE 1. TIME FROM THE START OF THE CLASS PERIOD TO A CERTIFICATION DECISION OR A DISMISSAL WITHOUT CERTIFICATION IN CASES ASSERTING ONLY §§ 11 OR 12 CLAIMS, 2002-2009



The results are striking: § 13's three-year limitations period, denoted in the Figure as a horizontal dashed line, would have expired prior to a certification decision in 73 percent (38 of 52) of cases that reached a certification decision and in 44 percent (38 of 86) of all filed cases. To provide more detail on the 52 cases

depicted in the Figure that reached a certification decision, § 13's three-year limitations period would have expired before an order on a motion for class certification in 11 of the 12 cases reaching such an order. And that period would have expired before an order preliminarily approving a proposed class settlement in 29 of the 42 cases reaching such an order.[9]

This same approach also permits characterization of the efficiency costs of the Second Circuit's recent decision[10] to further limit *American Pipe*'s reach in the context of claims brought under § 10(b) of the Securities Exchange Act and SEC Rule 10b-5, as governed by the five-year limitations period Congress has prescribed for such claims.[11] To that end, Figure 2 presents a graphical summary of an analysis performed on a random sample of 500 cases drawn from the roughly 1200 securities class actions asserting § 10(b) claims filed during 2002-2009.

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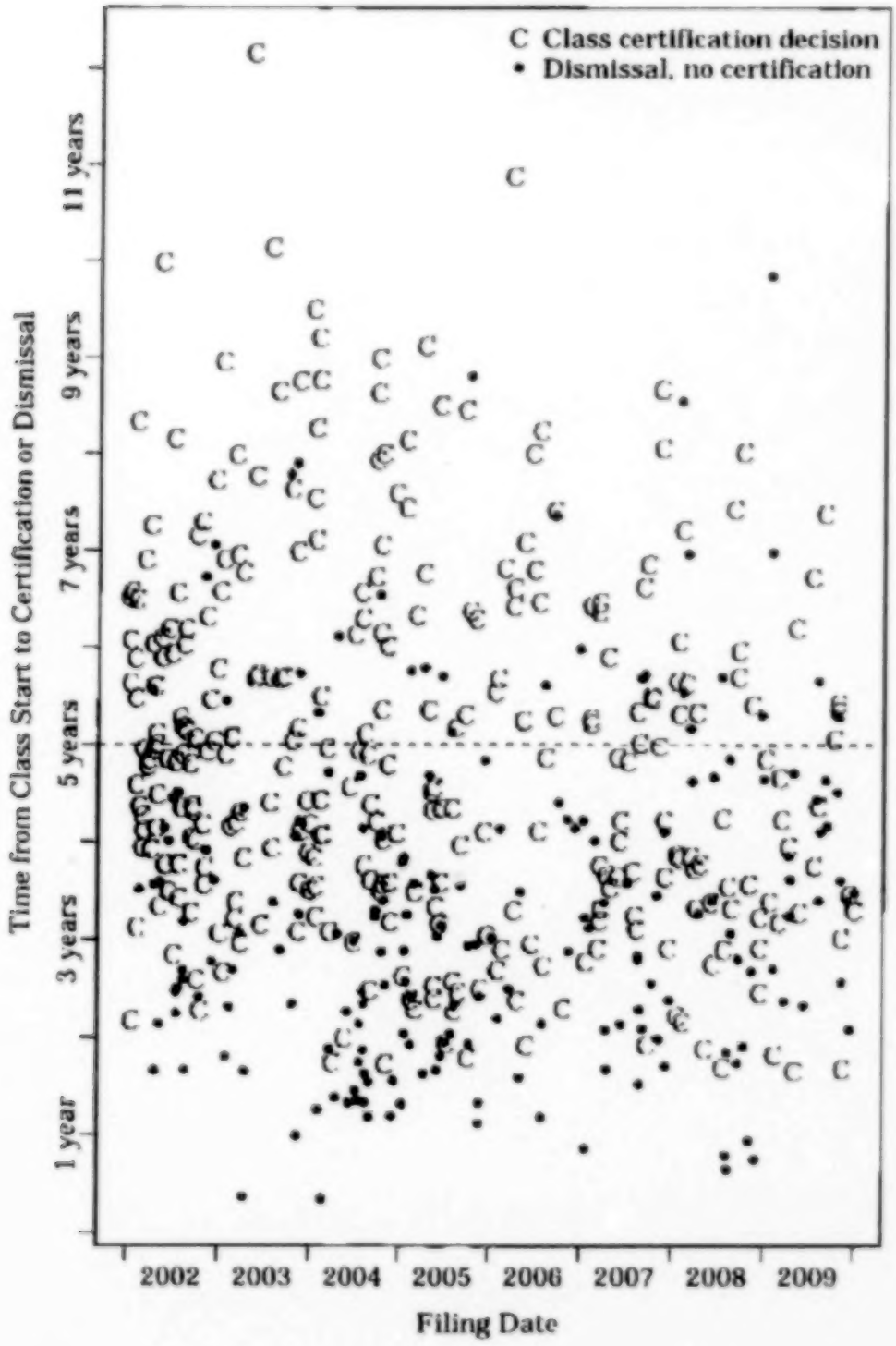
[9] Two cases in the sample of §§ 11 and 12 cases produced both an order on a motion for certification and a preliminary order approving a class settlement beyond the three-year limitations period. This explains why the numbers reported for cases falling into each category sum to 40 (11 + 29) rather than 38, and why the numbers reported for cases reaching the two types of orders sum to 54 (12 + 42) rather than 52.

[10] *See SRM Glob. Master Fund Ltd. P'ship v. Bear Stearns Cos.*, 829 F.3d 173, 177 (2d Cir. 2016).

[11] *See* 28 U.S.C. § 1658(b) (requiring securities fraud cases brought under § 10(b) and Rule 10b-5 to be brought within "5 years after such violation").

FIGURE 2. TIME FROM THE START OF THE CLASS PERIOD TO A CERTIFICATION DECISION OR A DISMISSAL WITHOUT CERTIFICATION IN CASES ASSERTING § 10(b) CLAIMS, 2002-2009



The results are again striking: The five-year limitations period that applies to § 10(b) claims would have expired prior to a certification decision in 44 percent (135 out of 307) of cases that reached a certification decision and in 27 percent (135 out of 500) of all filed cases in the sample.[12] To provide more detail on the 307 cases depicted in Figure 2 that reached a certification decision, the five-year limitations period that applies to such claims would have expired prior to an order on a certification motion in 42 of 86 cases reaching such an order. And that period would have expired prior to an order preliminarily approving a settlement class in 97 of 227 cases reaching such an order.[13]

Using the above estimates and extrapolating to the roughly 4355 securities class actions filed since 1996 provides a more general estimate for the set of cases

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[12] As with the prior analysis, keying the calculation of elapsed time to the start of the class period is consistent with the weight of authority among lower courts that § 1658(b)'s five-year limitations period is subject to an event-accrual rule—*i.e.*, the date of the misrepresentation or the completion of (or commitment to complete) the purchase or sale of the security. *See, e.g.*, *McCann v. Hy-Vee, Inc.*, 663 F.3d 926, 932 (7th Cir. 2011) (holding that the five-year limitations period starts upon misrepresentation); *In re Exxon Mobil Corp. Sec. Litig.*, 500 F.3d 189, 200 (3d Cir. 2007) (same); *see also Arnold v. KPMG LLP*, 334 F. App'x 349, 351 (2d Cir. 2009) (explaining that the limitations period starts when parties commit to purchase or sell). The margin of error for the above estimates, calculated at the standard 95 percent confidence level, is ±5.5 percent for the first and ±3.9 for the second. In other words, the 95 percent confidence interval is 38 to 50 percent for the first estimate and 23 to 31 percent for the second.

[13] Four of the cases in the sample of § 10 cases produced both an order on a motion for certification and a preliminary order approving a class settlement beyond the five-year limitations period, which explains why the numbers reported for cases falling into each category sum to 139 (42 + 97) rather than 135.

filed over the 20-year period from 1996 to 2016: Plaintiffs seeking to preserve their rights in the event of denial of class certification would have needed to file protective actions in as many as 1175 cases.[14] Had even a handful of potential class members in each case done so as the end of the relevant three- or five-year limitations period approached, total filings, whether interventions or separate lawsuits, would have easily numbered in the thousands. Class members who did not do so would have forever lost their right to seek redress had class certification been denied.

C. Discussion

While the above empirical analyses might raise the concern that the analyzed sample of securities class actions filed during 2002-2009 is somehow idiosyncratic, or that a sea-change in the composition of the case pool going forward will render any backward-looking estimate an uncertain guide to the future, several considerations suggest that the above estimates are, if anything, conservative.

First, the estimates do not account for the fact that a case that never produces a certification order, but is not dismissed until *after* the limitations period expires, can still generate protective filings. Figures 1 and 2 both suggest the existence of a non-trivial number of such cases—these are cases denoted as dots that

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[14] *See* Alexander Aganin, *Securities Class Action Filings: 2016 Year in Review*, Cornerstone Research 40 (2017), https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2016-YIR (reporting more than 4,355 securities class action lawsuits between 1996 and 2016). The "1175 cases" figure was derived by multiplying the 4,355 cases filed since 1996 by the above-reported 27 percent estimate of the proportion of cases in the 500-case sample that reached a certification order after the five-year limitations period.

fall above the horizontal dashed line drawn at the relevant three- or five-year limitations period. In such cases, a motion for certification may have been filed but not yet adjudicated when the court granted a pending motion for judgment on the pleadings or summary judgment. An absent class member in such a case would have faced the expiration of the relevant repose period with class status uncertain, and would thus have needed to file a protective action in order to preserve the right to pursue a claim.

Second, the above estimates do not account for the fact that, under the Second Circuit's approach, a potential class member's rights can be cut off by the relevant three- or five-year limitations period because of *any* defect that is fatal to a class claim, not just denial of certification.[15] Without *American Pipe*'s protective rule, absent class members who lack complete confidence that they have canvassed all possible legal hurdles to recovery may make protective filings even after class certification has been granted.[16]

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[15] The petitioner's situation in the prior *IndyMac* case is illustrative, as the attempted intervention came after the district court dismissed some of the class claims on standing grounds because the lead plaintiff had not purchased some of the securities in question. *Police & Fire Ret. Sys. of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 109 (2d Cir. 2013), *cert. dismissed as improvidently granted sub nom. Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, 135 S. Ct. 42 (2014); *see also Griffin v. Singletary*, 17 F.3d 356, 360 (11th Cir. 1994) (noting that a potential class member's concern about defects in the named representative's standing to pursue certain class claims may also generate protective filings).

[16] It is also the case that putative class members, having made protective filings without *American Pipe*'s assurance, may ultimately choose not to pursue their claims in cases in which class certification is later denied, perhaps because certification-related

A final reason the above estimates are likely to be conservative requires consideration of possible dynamic responses by litigants and judges to a decision by this Court limiting *American Pipe*'s reach. On the one hand, a decision limiting *American Pipe* would create perverse incentives for litigants to delay pre-trial proceedings to cut off potential class members' opt-out rights. Class action defendants could be expected to prolong pre-trial and certification proceedings as long as possible to extinguish any remaining live claims against them. After all, once the relevant three- or five-year limitations period has lapsed, a decision denying class certification would become a victory on the merits as to any potential class members who did not take protective action. Even lead class counsel might have a disincentive to hurry, since the running of the limitations period would leave absent class members who have not taken protective action with no further chance to opt out, thus preventing any class member who is dissatisfied with the course of the litigation or a proposed settlement from pursuing a separate action.[17] If litigants on either side of the "v."

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discovery or the court's order denying certification reveals weaknesses in the case that were not apparent at the time of the protective filing. This is important, for it shows that the efficiency costs of protective filings following a decision by this Court restricting *American Pipe*'s reach will not be limited to cases in which the district court ultimately grants certification.

[17] This aligns with the longstanding recognition by courts and commentators of possible agency costs in representative actions and the role Rule 23's opt-out mechanism plays in mitigating those costs. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626-27 (1997); *see also Principles of the Law of Aggregate Litigation* § 2.07(a) (Am. Law Inst. 2010); John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370, 376-77 (2000).

slow-walk the proceedings, more cases could be expected to reach certification decisions beyond the relevant three- or five-year limitations period.

On the other hand, the Second Circuit's approach limiting *American Pipe*'s reach might lead district judges to speed up their consideration of securities cases in an effort to preserve the ability of absent class members to make meaningful decisions about how to pursue their rights. To be sure, such prioritization of securities cases would not be costless. A judge could not move securities cases up in the queue without causing other litigants to wait longer for justice. Accelerating pre-certification proceedings would also necessarily shorten the time devoted to briefing and decision on lead-plaintiff and Rule 12(b)(6) motions as well as certification-related discovery, thus potentially eroding the quality of judicial decision-making.[18] But in theory, judicial prioritization of securities cases could place countervailing, downward pressure on the volume of protective filings in the event of a decision limiting *American Pipe*'s reach.

Measuring the relative size of these competing effects is challenging. It is difficult, as empirical scholarship in civil procedure shows, to gauge behavioral responses to changes in procedural rules.[19] Still, the

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[18] Shortening pre-certification proceedings might also come at the cost of less time for the litigants to negotiate a settlement in the shadow of the unknown outcome of a certification decision.

[19] A recent example is debate over the effect of this Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and its progeny. *See, e.g.*, David Freeman Engstrom, *The* Twiqbal *Puzzle and Empirical Study of Civil Procedure*, 65 Stan. L. Rev. 1203, 1223-29 (2013); Jonah B. Gelbach, *Can the Dark Arts of the Dismal Science Shed Light on the Empirical Reality of Civil Procedure?*, 2 Stan. J. Complex Litig. 223, 229-37 (2014).

graphical presentations provided above give good reason to conclude that the effect of the former (litigant) response will equal or even exceed the effect of the latter (judicial) response. Figure 1 provides especially strong evidence in this regard: Cases that reached a certification decision *before* § 13's three-year limitations period expired tend to cluster just below that cutoff, making strategic delay without *American Pipe* plausible. By contrast, cases that reached a certification decision *after* § 13's three-year limitations period tend to be more diffusely distributed above that cutoff. Indeed, in more than half (23 out of 38) of these cases, a judge would have needed to accelerate precertification proceedings by more than a full year in order to reach a certification decision before § 13's three-year limitations period expired.[20]

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[20] A further reason to doubt district judges' ability to accelerate the certification process is what appears to be a trend toward substantial discovery prior to certification rulings, including expert testimony, and the resulting blurring of merits and non-merits discovery. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351-54 (2011) (requiring "significant proof" of "a general policy of discrimination" in order to meet Rule 23's commonality requirement under Title VII); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008) (noting the need for district courts to "formulate some prediction as to how specific issues will play out" to assess Rule 23's predominance requirement (quoting *In re New Motor Vehicles Can. Exp. Antitrust Litig.*, 522 F.3d 6, 20 (1st Cir. 2008))).

II. SOUND PRINCIPLES OF RESEARCH DESIGN COUNSEL AGAINST A "NATURAL EXPERIMENT" APPROACH OR A NARROW FOCUS ON OPT-OUT ACTIONS IN MEASURING THE EFFICIENCY COSTS OF A DECISION LIMITING *AMERICAN PIPE*'S REACH

A. The Challenges of an Ideal "Natural Experiment" Approach to Measuring Protective Filings

An alternative way to estimate the expected quantum of protective filings were *American Pipe* tolling held inapplicable to repose periods would be to use the "natural experiment" approach commonly used in the social sciences and empirical legal studies scholarship.[21] The Second Circuit's June 2013 *IndyMac* decision—the first case in which that court held *American Pipe* inapplicable to repose periods[22]—would seem to provide an opportunity to use this approach. In principle, one could compare the quantum of protective filings across a "comparison" set of cases filed prior to *IndyMac* in which the statutory repose period expired *before IndyMac* and a "treatment" set of cases that were filed before *IndyMac* but in which the statutory repose period didn't expire until *after IndyMac*.[23]

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[21] *See, e.g.*, Jonah B. Gelbach & Jonathan Klick, *Empirical Law and Economics, in* Oxford Handbook of Law and Economics (Francesco Parisi ed., 2017).

[22] *IndyMac*, 721 F.3d at 109.

[23] The resulting "straddle" method—examining cases filed before a rule change, and then comparing the incidence of litigation events that occur before or after that change—is a common means of mitigating selection bias. *See* William Hubbard, *Testing for Change in Procedural Standards, with Application to* Bell Atlantic v. Twombly, 42 J. Legal Studies 35, 37-40 (2013).

But there are several obstacles to successfully deploying this approach. First, the *IndyMac* case concerned only claims brought under §§ 11 and 12 of the Securities Act and so was merely the opening salvo among the Second Circuit's holdings limiting *American Pipe*'s reach. It was only quite recently, in 2016, that the Second Circuit expanded its rule to the far more numerous claims brought under § 10(b) of the Securities Exchange Act and SEC Rule 10b-5.[24] Consequently, many putative class members in cases filed in district courts within the Second Circuit would have been uncertain as to whether they would enjoy *American Pipe*'s protection if class certification were denied. Such uncertainty would blunt any "treatment" effect of Second Circuit case law.

A second obstacle comes at the intersection of the current circuit split on *American Pipe*'s application to repose periods and the liberal rules governing personal jurisdiction and venue for claims brought under the federal securities laws. While the Sixth and Eleventh Circuits recently joined the Second Circuit in limiting *American Pipe*'s reach,[25] the Tenth Circuit long ago took the opposite position.[26] The remaining circuits have yet to decide one way or the other. This is important because the nationwide service-of-process and permissive venue provisions in the federal securities laws grant individual plaintiffs liberal choice

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[24] *See SRM Glob. Master Fund*, 829 F.3d at 177 (holding that *American Pipe* does not apply to the five-year repose period applicable to Rule 10b-5 claims in 28 U.S.C. § 1658(b)(2)).

[25] *See Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F.3d 780, 794-95 (6th Cir. 2016); *Dusek v. JPMorgan Chase & Co.*, 832 F.3d 1243, 1249 (11th Cir. 2016).

[26] *Joseph v. Wiles*, 223 F.3d 1155, 1168 (10th Cir. 2000).

of fora in which to bring suit.[27] The absence of significant jurisdictional hurdles further blunts the treatment effect of the Second Circuit's changes in case law. If litigants who might wish to pursue separate actions can duck the Second Circuit's holding by filing suit in the Tenth Circuit or the circuits that have not yet considered *American Pipe*'s reach, then an empirical analysis keyed to case filings within the Second Circuit will understate, perhaps substantially, the impact that a Supreme Court decision limiting *American Pipe* would have across the entire federal system.

Even if these problems somehow could be overcome, there is a third problem: insufficient data.[28] As an initial matter, claims brought under §§ 11 and 12 of the

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[27] *See* Securities Act, § 22, 15 U.S.C. § 77v(a), and Securities Exchange Act, § 27, 15 U.S.C. § 78aa(a). As to personal jurisdiction, most lower courts agree that plaintiffs suing under either the Securities Act (*e.g.*, §§ 11 or 12 claims) or the Securities Exchange Act (*e.g.*, Rule 10b-5 claims) need show only that the defendant has minimum contacts with the United States as a whole rather than individual states. *See, e.g.*, *SEC v. Ross*, 504 F.3d 1130, 1139-40 (9th Cir. 2007); *In re Fed. Fountain, Inc.*, 165 F.3d 600, 601-02 (8th Cir. 1999); *United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320, 1330 (6th Cir. 1993); *Hilgeman v. Nat'l Ins. Co. of America*, 547 F.2d 298, 301 (5th Cir. 1977); *SEC v. Sharef*, 924 F. Supp. 2d 539, 544 (S.D.N.Y. 2013). As to venue, the securities laws afford plaintiffs wide choice regarding where to file. The venue provision in § 27 of the Securities Exchange Act is especially permissive, rendering venue proper "in the district wherein any act or transaction constituting the violation occurred." 15 U.S.C. § 78aa(a). As one court put it, "the intent of the venue and jurisdiction provisions of the securities laws is to grant potential plaintiffs liberal choice in their selection of a forum." *Ritter v. Zuspan*, 451 F. Supp. 926, 928 (E.D. Mich. 1978).

[28] *See* Stanford Securities Litigation Analytics, *supra* note 5.

Securities Act are not sufficiently numerous to generate reliable empirical estimates.[29] But even if we were to use the more numerous cases asserting claims under § 10(b) and Rule 10b-5, the short time since the Second Circuit's June 2013 *IndyMac* decision would severely limit the available treatment sample. For instance, in 8 of the 75 cases asserting § 10(b) claims filed in the Second Circuit between June 2011 and June 2013, the repose period expired as to at least some putative class members even before *IndyMac* was decided, once more blunting the treatment effect. And in 13 of the 75 cases, the entire case terminated before *IndyMac*, leaving no possibility for any treatment effect at all.[30] We also face what statisticians call a right-censoring problem: In 32 of the 75 cases asserting § 10(b) claims filed over the same June 2011 to June 2013 span, the repose period has not yet expired even as of this writing for at least some putative class members.

Restricting our treatment sample to only those cases filed after the *IndyMac* decision would fare no better. Indeed, in all but two of the 84 cases asserting § 10(b)

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[29] From 2007 to the present, district courts within the Second Circuit saw roughly seven lawsuits per year asserting §§ 11 and 12 claims. Claims under § 14 of the Securities Exchange Act were also sparse, having only recently increased from a dozen per year nationwide during the 2000s to a few dozen per year more recently, fueled by a rise in merger-objection suits. *See* Stefan Boettrich & Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2016 Full-Year Review*, NERA Economic Consulting 5 fig.3 (Jan. 2017), http://www.nera.com/content/dam/nera/publications/2017/PUB_2016_Securities_Year-End_Trends_Report_0117.pdf.

[30] One case falls into both categories, in that the repose period would have run as to at least some putative class members, but the case terminated prior to *IndyMac*.

claims filed in the Second Circuit from June 2013 to June 2015—the two-year span after the Second Circuit's *IndyMac* decision—the repose period still has not yet run for all putative class members as of this writing. And in 21 of these 84 cases, the repose period has not yet run as to *any* putative class member, thus eliminating any possibility of a treatment effect. These various problems grow more acute—and afflict more of our case observations—as we move backward or forward in time from the Second Circuit's June 2013 *IndyMac* decision, significantly limiting the overall quantity and quality of available data observations.

B. Respondents' Misplaced Reliance upon "Opt-Out" Studies

This discussion shows that the most obvious "natural experiment" approach suffers so many problems as to be practically useless. In Part I, *supra*, we offered an alternative empirical approach. We turn now to the approach that respondents took in their Brief in Opposition to Certiorari: Respondents cited a study published by Cornerstone Research[31] for the proposition that the flow of protective filings will be trivial. BIO 21-22. The Cornerstone study suffers from numerous flaws, at least when deployed in support of respondents' claims about protective filings.

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[31] *See* Amir Rozen, Brendan Rudolph, & Christopher Harris, *Opt-Out Cases in Securities Class Action Settlements: 2012-2014 Update*, Cornerstone Research (2016), https://www.cornerstone.com/Publications/Reports/Opt-Out-Cases-in-Securities-Class-Action-Settlements-2012-2014; Amir Rozen, Brendan Rudolph, & Christopher Harris, *Opt-Out Cases in Securities Class Action Settlements*, Cornerstone Research (2013), https://www.cornerstone.com/Publications/Reports/Opt-Out-Cases-in-Securities-Class-Action-Settlements.

First, the Cornerstone study tallies individual "opt out" actions only in class actions that ultimately settled. The study therefore does not count protective filings in cases where class certification ultimately was denied or in cases that otherwise do not reach settlement (*e.g.*, because of a dispositive motion). Yet individual filings may be just as wasteful in such cases as in cases that settle, because putative class members who have made protective filings out of uncertainty about *American Pipe*'s reach might choose to drop their claims after denial of class certification or pre-trial termination.

Second, Cornerstone's study considers only separate filings and does not appear to consider interventions filed by putative class members in the proceedings in which class certification was originally sought. This is important because interventions may be a significant channel through which putative class members will preserve their rights if *American Pipe* tolling is unavailable. They also consume substantial judicial resources. Retired Federal Judges Amicus Cert. Br. 16 (noting that interventions can "consume substantial resources of the court and the parties").

Finally, the Cornerstone study is hampered by its limited time-frame in relation to the relevant Second Circuit decisions. The Cornerstone data ends in 2014, mere months after the Supreme Court dismissed the *IndyMac* case as improvidently granted, 135 S. Ct. 42, and two years *before* the Second Circuit extended its *IndyMac* decision to statutes of repose for § 10(b) actions.[32] There is thus practically no opportunity for the effects of *IndyMac* to be reflected in the filings included within the scope of the study. In other words, the Cornerstone study suffers from a severe version of the research-design problems

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[32] *SRM Glob. Master Fund*, 829 F.3d at 177.

that afflict the "natural experiment" approach described above.

III. LIMITING *AMERICAN PIPE*'S REACH WOULD NOT YIELD ANY COUNTERVAILING BENEFIT

A potentia[1] counter to the clear efficiency concerns raised above is that protective filings, though consuming substantial judicial and private resources, would nonetheless permit defendant entities to gauge their potential liability in the event certification is denied, thus justifying any efficiency cost. In reality, however, protective interventions and filings would offer defendant entities who wish to assess their potential liability if certification is denied strikingly little guidance. The reasons are two-fold.

First, the filing of the class complaint itself provides defendants with sufficient information about the substance of the claims against them and the identities of the claimants to satisfy the purpose of limitations periods of ensuring that defendants have notice of their potential liability within a defined time window. *Am. Pipe*, 414 U.S. at 554-55; Pet. Br. 33-34.

Second, many defendants in securities class actions have additional, and even more precise, means of determining their potential legal liability. Large securities holders—who are also most likely to have independently marketable claims—are required by the federal securities laws to make annual, publicly available Form 13F filings describing their investment positions above a certain dollar threshold.[33] And the investor relations offices of larger issuers often track such information for a range of purposes.

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[33] *See* 15 U.S.C. § 78m(f)(1).

But even if defendants do not track Form 13F data in the normal course of business, various free and publicly available online services do it for them.[34] Thus, a defendant can, with only a few online clicks, learn which among its larger investors were net purchasers or sellers during the class period (*i.e.*, the period the alleged fraud was "live"). The result is an estimate of potential liability that is far more useful than a gross tally of interventions or separately filed actions.[35]

In short, the efficiency toll of the Second Circuit's decision limiting *American Pipe*'s reach is not only likely to be significant, but also entirely unnecessary.

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[34] *See, e.g.*, *Facebook, Inc. (FB): Major Holders*, Yahoo! Finance, http://finance.yahoo.com/q/mh?s=FB+Major +Holders (last visited Mar. 3, 2017) (cataloging "major holders" of Facebook stock); *Ownership & Insiders: FB*, Fidelity, https://eresearch.fidelity.com/eresearch/evaluate/fundamentals/ownership.jhtml?stockspage=ownership&symbols=FB (last visited Mar. 3, 2017) (same).

[35] It is noteworthy that district judges regularly perform a somewhat similar analysis in determining which among the "lead plaintiff" candidates has the "largest financial interest," as required under the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). *See, e.g.*, *Foley v. Transocean Ltd.*, 272 F.R.D. 126, 127-28 (S.D.N.Y. 2011) (discussing the methodology district judges employ, including, *inter alia*, examining the "net shares purchased" and "net funds expended" during the class period by lead-plaintiff candidates). And consulting firms have long developed sophisticated models of exposure in securities fraud cases. *See, e.g.*, Kenneth R. Cone & James E. Laurence, *How Accurate Are Estimates of Aggregate Damages in Securities Fraud Cases?*, 49 Bus. Lawyer 505, 506-08 (1994) (assessing such models as developed by litigation consultant Lexecon Inc.—now Compass Lexecon—and competitor consultancies).

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below and hold that the *American Pipe* rule applies in full to § 13's three-year limitations period.

Respectfully submitted,

DAVID FREEMAN ENGSTROM
Lead Amicus Curiae and Counsel of Record
Stanford Law School
559 Nathan Abbott Way
Stanford, CA 94305-8610
(650) 721-5859
(dfengstrom@law.stanford.edu)

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CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM,
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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF CURRENT AND FORMER DIRECTORS OF PUBLICLY TRADED COMPANIES: CHARLES M. ELSON AND HOWARD B. WIENER, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Frank J. Johnson
JOHNSON & WEAVER, LLP
600 West Broadway
Suite 1540
San Diego, CA 92101
(619) 230-0063
frankj@johnsonandweaver.com

Ruthanne M. Deutsch
Counsel of Record
Hyland Hunt
DEUTSCH HUNT PLLC
300 New Jersey Ave., NW
Suite 900
Washington, DC 20001
(202) 868-6915
rdeutsch@deutschhunt.com

QUESTION PRESENTED

Does the timely filing of a valid class action satisfy or toll the three-year filing period set by Section 13 of the Securities Act of 1933 with respect to subsequent opt-out suits by individual class members?

TABLE OF CONTENTS

QUESTION PRESENTED i

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. JETTISONING *AMERICAN PIPE* WILL HARM CORPORATE DEFENDANTS 5

A. The *American Pipe* Rule Fosters Efficiency and Judicial Economy 5

B. Defendants' Interests in Repose Are Amply Protected Under *American Pipe* 7

C. Refusing to Allow Putative Class Members To Satisfy Section 13 Through the Filing of the Class Action Undermines Defendants' Interests in Efficient Resolution of Securities Claims 10

II. PRESERVING APPLICATION OF *AMERICAN* PIPE IS CONSONANT WITH CONGRESS'S SECURITIES LITIGATION REFORM EFFORTS. 15

CONCLUSION 21

TABLE OF AUTHORITIES

CASES:

American Pipe & Constr. Co. v. Utah,
414 U.S. 538 (1974) ..... *passim*

Amgen Inc. v. Conn. Ret. Plans & Trust Funds,
133 S. Ct. 1184 (2013) 15, 16

Astoria Federal Savings & Loan Assn. v. Solimono,
501 U.S. 104 (1991) 17

Briscoe v. LaHue,
460 U.S. 325 (1983) 17

Crown, Cork & Seal Co. v. Parker,
462 U.S. 345 (1983) 5, 6, 10, 13

CTS Corp. v. Waldburger,
134 S. Ct. 2175 (2014) 7, 8

Devlin v. Scardalletti,
536 U.S. 1 (2002) 6

Gabelli v. SEC,
133 S. Ct. 1216 (2013) 10

Gen. Tel. Co. of Sw. v. Falcon,
457 U.S. 147 (1982) 6

Hertz Corp. v. Friend,
559 U.S. 77 (2010) 12

Holmes v. Securities Investor Protection Corp.,
503 U.S. 258 (1992) 17

In re Discovery Zone Sec. Litig.,
181 F.R.D. 582 (N.D. Ill. 1998) 19

Joseph v. Wiles,
223 F.3d 1155 (10th Cir. 2000) 19

Kimble v. Marvel Entertainment, LLC,
135 S. Ct. 2401 (2015) 20

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,
501 U.S. 350 (1991) 19

Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit,
547 U.S. 71 (2006) 16

Midlantic Nat'l Bank v. N.J. Dep't of Envt'l Protection,
474 U.S. 494 (1986) 17

Mott v. R.G. Dickinson & Co.,
No. 92-1450-PFK, 1993 WL 63445 (D. Kan. Feb. 24, 1993) 19

Pa. Pub. Welfare Dep't v. Davenport, ,
495 U.S. 552 (1990) 17

Salkind v. Wang,
No. CIV.A. 93-10912-WGY, 1995 WL 170122 (D. Mass. Mar. 30, 1995) 19

Tellabs, Inc., v. Makor Issues & Rights, Ltd,
551 U.S. 308 (2007) 15

Tregenza v. Great Am. Commc'ns Co.,
12 F.3d 717 (7th Cir. 1993) 9

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011) 6

Young v. United States,
535 U.S. 43 (2002) 10

STATUTES AND RULES:

15 U.S.C.
§ 77m ..... *passim*
§ 78bb(f)(1) 16
§ 78u-4 16

28 U.S.C. § 1658(b) 19

Private Securities Litigation Reform Act of
1995 (PSLRA), Pub. L. No. 104-67, 109
Stat. 757 (1995) 15

Securities Litigation Uniform Standards Act of
1998, Pub. L. 105-353, 112 Stat. 3227 16

Fed. R. Civ. P. 23 ..... *passim*

OTHER AUTHORITIES:

51 Am. Jur. 2d Limitation of Actions § 4 (2014) 7, 8

78 Cong. Rec. 8199 (May 7, 1934) 9

H.R. REP. NO. 104-369 (1995) (Conf. Rep.) 15, 16

H.R. REP. NO. 105-702 (1998) 18

S. REP. NO. 107-146 (2002) 19

Securities Investor Protection Act of 1991: Hearing on S. 1533 Before the Subcomm. on Securities of the S. Comm. on Banking, Housing, and Urban Affairs, 102d Cong. (1992) 18

Svetlana Starykh & Stefan Boettrich, *Recent Trends in Securities Class Action Litigation: 2015 Full-Year Review* (2016) 11, 14

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BRIEF OF CURRENT AND FORMER DIRECTORS OF PUBLICLY TRADED COMPANIES: CHARLES M. ELSON AND HOWARD B. WIENER, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

Amici have served or are currently serving on the boards of publicly traded companies and together have years of experience in corporate governance and the economic realities of securities litigation. They

[1] This brief is filed with the written consent of all parties. Petitioner has a universal letter of consent on file with the Clerk; Respondents' letter of consent is filed with this brief. No counsel for either party authored this brief in whole or in part, and no person or entity other than the *amici* or their counsel made a monetary contribution to the brief's preparation or submission.

write to share their informed view that the judicial efficiencies and rational litigation conduct fostered by *American Pipe* protect not only investor-plaintiff interests, but also those of corporate defendants, and ultimately, the bottom line that benefits all.

Charles M. Elson holds the Edgar S. Woolard Chair in Corporate Governance at the University of Delaware. He has served on many corporate boards, and currently sits on the boards of two publicly traded entities. He holds various not-for-profit directorships and has published widely on issues of corporate governance. Professor Elson's myriad professional affiliations include service as a member of the Standing Advisory Group of the Public Company Accounting Oversight Board.

Justice Howard B. Wiener (ret.) served for years on the California Court of Appeal and has been engaged in private dispute resolution since January 1994, serving in more than 5000 cases as a mediator, arbitrator, and private judge. His assignments have included business disputes, intellectual property, professional liability, and insurance coverage encompassing bad faith litigation, product liability, and environmental cases. He has also handled scores of class action lawsuits including securities fraud litigation. Justice Wiener has served as a director on the boards of publicly traded corporations and, in that capacity, was named as a defendant in a derivative action.

Justice Wiener's experiences as a corporate director and his years as a judge and mediator lead him—along with Professor Elson—to support procedural approaches in securities cases that

promote the efficient and expeditious resolution of conflicts, encourage the dedication of scarce resources to the most meritorious cases, and avoid needless litigation. Applying *American Pipe* to the three-year bar of Section 13 of the Securities Act, 15 U.S.C. § 77m, does just that.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The *American Pipe* rule is part and parcel of a sound structure of class and individual litigation that benefits plaintiffs and defendants alike. Particularly in the securities litigation context, the parties have a shared interest, repeatedly endorsed by Congress, in fostering representative class actions that are strongly litigated by lead plaintiffs in one venue, under one timetable, minimizing discovery costs and allowing expeditious resolution. But a proliferation of separate actions across multiple venues will inevitably result if unnamed class members are not able to rely on the timely filing of a class action to satisfy Section 13's time bars.

Corporate directors have a strong interest in minimizing litigation, which is time consuming and drains resources from the core business of producing goods and services of value. Applying *American Pipe* serves this interest without any damage to the repose provided by Section 13's three-year bar. Because a timely-filed class action complaint suffices to provide defendants with effective notice of the basic character of potential claims and the identities of the claimants, no repose interests remain to protect after the class action has been filed. Depriving putative class

members of their ability to rely on the timely filing of the class action to protect their rights will, however, yield a flood of protective actions. Defendants' interest in efficient resolution of claims will be undercut, with no additional or more certain repose gained in exchange. Over-enforcement of Section 13's three-year bar will, perversely, generate more litigation, not less.

The measured course of fewer and better litigated cases that is charted by *American Pipe*, moreover, is fully aligned with the direction of securities litigation reforms undertaken by Congress in the decades since *American Pipe* was decided—reforms that aim to streamline securities class actions and promote quality over quantity. Despite repeated amendments to the securities statutes (including to the time limitations at issue in *Lampf*), Congress has never seen fit to disturb the operation of the sensible and well-settled procedural regime established in *American Pipe*. With reason. The *American Pipe* rule not only promotes the sound administration of justice, it is consonant with congressional intent in reforming procedures for securities litigation.

ARGUMENT

I. JETTISONING *AMERICAN PIPE* WILL HARM CORPORATE DEFENDANTS.

A. The *American Pipe* Rule Fosters Efficiency and Judicial Economy.

The anchoring concept of this Court's ruling in *American Pipe* is that the representative nature of a class action determines when a suit is "commenced" for putative class members. *See American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 550-552 (1974). For purposes of timeliness rules, class members who later intervene stand "as parties to the suit," *id.* at 551, and are deemed to have filed suit simultaneously with the filing plaintiff. "A contrary rule," the Court reasoned, "would deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure." *Id.* at 554.

In *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), the Court unequivocally extended *American Pipe*, clarifying that the Court would consider unnamed plaintiffs to have sued with the filing of the original class action complaint, whether the class members moved to intervene (as in *American Pipe*) or later opted out of the class to bring their own suit (as was the case in *Crown*). Without such guarantee, the "same inefficiencies" would result, and putative class members in fear of denial of class certification "would have every incentive to file a separate action prior to the expiration of [their] own period of limitations." *Id.* at 351.

Encouraging parties to file separate actions directly undermines the purpose of class actions: to "[s]ave the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 155 (1982). To function as intended, the filing of a class action creates a "classic legal fiction," under which "courts treat members of the asserted class as if they hav[e] instituted their own actions, at least so long as they continue to be members of the class," and they therefore have the benefit of tolling "for as long as the class action purports to assert their claims." *State Farm Mut. Auto Ins. Co. v. Boellstorff*, 540 F.3d 1223, 1229 (10th Cir. 2008). Class actions thus are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011).

Because *American Pipe* is a rule crafted to promote the judicial efficiencies of class actions, not to protect individual litigants, it applies even to absent class members who "did not rely upon the commencement of the class action (or who were even unaware that such a suit existed)." 414 U.S. at 551. Thus every putative class member, independent of individual conduct, has satisfied any time limits applicable to commencing his or her action once the class action itself is timely filed. *See also Devlin v. Scardalletti*, 536 U.S. 1, 10 (2002) ("[N]onnamed class members are ... parties in the sense that the filing of an action on behalf of the class tolls a statute of limitations against them.") (citing *American Pipe*).

American Pipe, in short, is an established feature of federal civil procedure: a judicially-crafted rule in furtherance of sound judicial administration that applies to all class actions, including securities litigation. Nothing in Section 13 purports to change this generally-applicable procedural rule, or otherwise affects investors' incentives to pursue individual over class relief. And because the *American Pipe* rule applies only when a class action has been timely filed, it neither excuses untimeliness nor disturbs repose. Instead, it aids all parties, and the courts, through avoidance of a "multiplicity of activity" in those cases where a class action is found "superior to other available methods for the fair and efficient adjudication of the controversy." *American Pipe*, 414 U.S. at 551 (quoting Rule 23(b)(3)).

B. Defendants' Interests in Repose Are Amply Protected Under *American Pipe*.

Defendants' interests in repose served by Section 13's three-year bar are safe under *American Pipe* even assuming Section 13 is treated as a statute of repose. *Accord* Pet. Br. at 33-34; 39-43. As this Court recognized in *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182 (2014), statutes of limitations and statutes of repose both "operate to bar a plaintiff's suit, ... [b]ut the time periods specified are measured from different points, and the statutes seek to attain different purposes and objectives." The three-year limit in Section 13, like a statute of repose, "puts an outer limit on the right to bring a civil action," *id.*, that is triggered by an event certain and unrelated to any discovery of wrongdoing. *See* 51 Am. Jur. 2d

Limitation of Actions § 4 (2014) (collecting cases). Statutes of repose assure defendants that if no action is brought within the time set by the legislature, they will be free from liability. *CTS Corp.*, 134 S. Ct. at 2183.

When a class action is filed within the three-year time limit, continued litigation of the claims encompassed within that action beyond the three-year period is fully consistent with the interests served by a statute of repose. The class action provides defendants notice "not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs, who may participate in the class," *American Pipe*, 414 U.S. at 555, before the three years run out and any right to absolute repose kicks in. Whether plaintiffs remain part of the class action, or eventually file their own suits, defendants know they are potentially liable to all putative class members. It matters not, for purposes of the limitations period, whether such actions eventually proceed collectively or individually, or how long they take to finish. All that matters for the interest in repose is that the action was commenced within three years of the triggering event (here, the registration or sale referenced in Section 13).

It follows that where, as here, a class action is timely filed, applying *American Pipe* simply does not intrude on interests protected by the limitations rules, whether the three-year period is treated as a statute of limitations or a statute of repose. Defendants have received notice and are protected against stale

evidence once the original class action is timely filed. *See Young v. United States*, 535 U.S. 43, 47 (2002).

And interests in timely filing that are particularly pronounced in the securities litigation context are likewise satisfied by applying *American Pipe*. Because *American Pipe*'s commencement rule applies only if the original class action is timely filed, any opportunity for investors to sit on the sidelines for decades and wait for a precipitous drop in price before filing suit based on a technical violation is avoided, and the repose promised by Section 13 is protected. *See* 78 Cong. Rec. 8199 (May 7, 1934) (recognizing that absent a limitations period, an investor finding a "technical mistake" need not sue if the price goes up but would have the option to sue if the security price goes down); *see also Tregenza v. Great Am. Commc'ns Co.*, 12 F.3d 717, 722 (7th Cir. 1993) (noting that time limits prohibit "opportunistic use of federal securities law" and that if plaintiffs were permitted to "wait[] patiently to sue," ... "[i]f the stock rebounded from the cellar they would have investment profits, and if it stayed in the cellar they would have legal damages. Heads I win, tails you lose.").

Application of *American Pipe* avoids this "heads I win, tails you lose" problem. Whether the time bar is triggered by plaintiff's actual or constructive knowledge, as under the one-year rule, or runs from the date a security was offered to the public, as with the three-year bar, the defendants' interests are equally protected once the original class action is timely commenced, as the contours of a "plaintiff's opportunity for recovery and a defendant's potential liabilities" are established. *Young*, 535 U.S. at 47.

At bottom, "[s]tatutes of limitations are intended to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Gabelli v. SEC*, 133 S. Ct. 1216, 1221 (2013). During the pendency of a timely-filed class action, the claims are wide awake, and defendants know it.

C. Refusing to Allow Putative Class Members To Satisfy Section 13 Through the Filing of the Class Action Undermines Defendants' Interests in Efficient Resolution of Securities Claims.

Although there is no danger to defendants' repose interests from application of *American Pipe*, refusal to apply *American Pipe* to Section 13's three-year limitations period would gravely undermine *American Pipe*'s protection of defendants' interests in streamlined and minimal-cost resolution of securities claims. *Accord* Pet. Br. 22-25.

As predicted by this Court, failure to allow the filing of a class action to satisfy the limitations period for putative class members will lead to a flood of protective filings, as they "would have every incentive to file a separate action prior to the expiration of [their] own period of limitations," *Crown, Cork & Seal Co.*, 462 U.S. at 351, out of fear that class certification would be denied, to preserve their ability to control their own individual litigation in the future, or to protect against any number of other contingencies. And defendants, like plaintiffs and courts, will pay the price of this proliferation of individual claims—

without obtaining any additional benefit in terms of repose.

1. Investors—particularly those with fiduciary obligations—will be compelled to file separate actions to protect their interests in the event of some deficiency, or perceived risk of deficiency, with the class action. Class certification proceedings generally take a very long time in securities litigation; the *median* time from the filing of a securities class action complaint to a decision on class certification is about 2.4 years. Svetlana Starykh & Stefan Boettrich, *Recent Trends in Securities Class Action Litigation: 2015 Full-Year Review*, at 20 (2016).[2]

A recent study by law professors examining the number of cases in which class certification procedures overran repose periods in securities class actions estimated that if *American Pipe* did not apply, protective individual filings were likely in nearly half of the class actions that reached a court order on certification, and more than a quarter of total securities class actions. *See* Br. of Civil Procedure and Securities Law Professors as *Amici Curiae* in Support of Petitioner, Part II. The study estimated that the Second Circuit's approach would have induced additional protective filings in approximately 1175 class actions out of 4355 total class actions filed. *Id.* at Section II.B. That would spawn thousands more new cases than the estimated 1175 cases in which protective filings would be made, because *many* putative class members would have to bring individual filings in *each* case. *See* Pet. Br. 23-24 (noting that

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[2] *Available at* http://www.nera.com/content/dam/nera/publications/2016/2015_Securities_Trends_Report_NERA.pdf.

securities class actions often have thousands of members).

2. This proliferation of protective individual actions will seriously undermine defendants' interests in efficient, effective dispute resolution in several ways.

It will necessarily result in more time and resources expended on litigation that is wholly collateral to the merits of the dispute. For example, questions of whether (or which) individual actions should be stayed and which should proceed alongside the class action are likely to be contested. *See* Pet. Br. 23. And, if putative class members file separate actions to protect their rights, those actions may well be filed in different forums than the class action (as happened here), raising a multitude of procedural issues related to transfer, consolidation, and multidistrict litigation. *See* Br. of Public & Private Pension Funds as *Amicus Curiae* Supporting Pet. at 17-18, *Pub. Employees' Retirement Sys. of Miss. v. IndyMac MBS, Inc.*, 134 S. Ct. 1515 (2014) (No. 13-640) ("*IndyMac* Pension Fund *Amicus* Br.").

Defendants will thus be forced to spend time and resources needlessly, to resolve *where* and *how* the case will proceed—issues that do not further the resolution of the merits at all, much less in a streamlined fashion. *Cf. Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) (eschewing jurisdictional rules that "complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims").

Even if plaintiffs choose to protect their rights through intervention rather than a separate action,

protective filings will require ancillary litigation that is inconsistent with a streamlined resolution of the dispute. "Putative class members frequently are not entitled to intervene as of right under Fed. Rule Civ. Proc. 24(a), and permissive intervention under Fed. Rule Civ. Proc. 24(b) may be denied in the discretion of the District Court." *Crown, Cork & Seal*, 462 U.S. at 350 n.4. Intervention may not be welcomed by the named plaintiffs, and it therefore is likely to become yet another complex case-management issue that must be litigated. *See IndyMac* Pension Fund *Amicus* Br. at 15-16. Moreover, many intervenors may be investors proceeding *pro se*, who often require more resources from courts and defendants alike. *See* Br. of Retired Fed. Judges as *Amici Curiae* in Support of Certiorari, at 17.

Beyond the additional procedural complexity of the litigation, the increased protective filings will almost certainly complicate the substantive resolution of the case, and defendants are significantly less likely to be able to resolve suits in a timely fashion. Individual investors that have retained independent counsel and intervened or filed a separate suit are likely to frame the case differently from class counsel and to have independent approaches to discovery and motion practice. *See, e.g.*, Pet. Br. 22-23; *IndyMac* Pension Fund *Amicus* Br. at 17-18. This has several deleterious consequences for defendants: it requires them to fight multiple small battles with different individual investors on similar, but not identical, issues—rather than permitting a streamlined resolution of the merits under experienced lead counsel, as Congress anticipated, in enacting securities litigation reforms. *See infra*, Part II. And

casting away *American Pipe* will almost certainly prolong the time it takes to resolve the litigation, which is already, in general, quite long for most securities cases. *See* Pet. Br. 26-27 & n.5 (collecting examples of long-running securities cases).

Furthermore, the multiplication of individual suits in different forums arising out of the same transaction will substantially undercut defendants' ability to dispose of non-meritorious cases at an early stage through dismissal of the case for the entire class. Motions to dismiss are filed in roughly 96 percent of securities class actions. Starykh & Boettrich, *supra*, at 19. The heightened pleading standard for fraud-based claims embodies congressional intent to further early resolution of cases that have no merit. Declining to apply *American Pipe*, and adopting a rule that spawns multiple individual protective filings in securities class actions, will substantially undermine the ability of defendants to achieve early, and conclusive, resolution of cases that lack merit.

There is no repose "payoff" that would make up for these additional costs imposed on defendants from declining to apply *American Pipe*. Nor will there be less litigation due to individual claims failing the three-year bar. Jettisoning *American Pipe* will perversely result in *more* litigation as investor-plaintiffs necessarily respond by filing protective individual claims to protect their rights.

II. PRESERVING APPLICATION OF *AMERICAN PIPE* IS CONSONANT WITH CONGRESS'S SECURITIES LITIGATION REFORM EFFORTS.

1. Encouraging needless litigation and a multiplicity of individual suits on claims more efficiently resolved by class actions not only defeats the purposes of Rule 23, it thwarts securities litigation reforms. Congress has undertaken significant reforms based on its recognition that "[p]rivate securities fraud actions ... if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law." *Tellabs, Inc., v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). Congress has consistently legislated in the securities litigation arena to promote the streamlining of cases, discourage proliferation of competing needless actions, and minimize costs to litigants while at the same time ensuring that deserving cases receive full attention and sufficient judicial resources.

In 1995, Congress enacted the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 757 (1995), to "implement[] needed procedural protections" and "to discourage frivolous litigation." H.R. REP. NO. 104-369, at 31-32 (1995) (Conf. Rep.). In doing so, "Congress recognized that although private securities-fraud litigation furthers important public-policy interests, prime among them, deterring wrongdoing and providing restitution to defrauded investors, such lawsuits have also been subject to abuse, including the 'extract[ion]' of 'extortionate "settlements"' of frivolous claims. *Amgen*

Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1200 (2013) (quoting H.R. REP. NO. 104–369, at 31-32).

Key PSLRA measures passed in response to such perceived abuses included "heightened pleading requirements" for securities-fraud actions, limitations on recoverable damages and attorney's fees, provision of a "safe harbor" for forward-looking statements, imposition of new restrictions on the selection of (and compensation awarded to) lead plaintiffs, mandatory imposition of sanctions for frivolous litigation, and authorization of a stay of discovery pending resolution of any motion to dismiss. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81–82 (2006). *See also* 15 U.S.C. § 78u–4. These provisions work to strengthen investor control over securities litigation and encourage the expeditious resolution of securities-fraud actions on the merits, at the earliest moment.

Congress later fortified the PSLRA by enacting the Securities Litigation Uniform Standards Act of 1998, Pub. L. 105-353, 112 Stat. 3227 (SLUSA), which curtailed plaintiffs' ability to evade the PSLRA's limitations on federal securities-fraud litigation by bringing class action suits under state rather than federal law. *See* 15 U.S.C. § 78bb(f)(1).

In enacting these laws, Congress sought to curtail the spread of needless actions and to provide meritorious cases with better representation and more judicial resources. But, far from containing any perceived explosion of securities-fraud cases, abandoning the settled procedural regime established under *American Pipe* and its progeny would instead

foment one. Instead of encouraging investors to work together and pool efforts under the leadership of a plaintiff with the most at stake, and therefore presumptively best-suited to represent all, each plaintiff would be compelled to strike out on its own. And rather than navigating a steady course in one action with discovery stayed pending resolution of motions to dismiss, defendants instead would be playing whack-a-mole, as forced protective actions pop up across the country, each with its own discovery timetable and theory of the case. *See also supra* Part I.C.

2. Such chaos is not what Congress wanted. Congress is understood to legislate against a background of common-law adjudicatory principles. *See generally Briscoe v. LaHue*, 460 U.S. 325 (1983). Thus, when Congress enacts a statute, related judge-made law (like the *American Pipe* rule) remains in force and works in conjunction with the new statute absent a clear indication otherwise. *See, e.g., Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 267 (1992); *Midlantic Nat'l Bank v. N.J. Dep't of Envt'l Protection*, 474 U.S. 494, 501 (1986). To be sure, this maxim serves only as an analytical starting point, and may give way if the common law conflicts with statutory purpose, *see Astoria Federal Savings & Loan Assn. v. Solimono*, 501 U.S. 104, 108 (1991), or if the statutory language plainly evinces Congress's intent to depart from past practice, *see Pa. Pub. Welfare Dep't v. Davenport*, 495 U.S. 552, 563 (1990).

There are no such indications here. *American Pipe* serves the same purposes as Congress's securities litigation reforms: streamlining litigation, preserving

the efficiency of class actions, and avoiding a multiplicity of actions when litigants (and the courts) are better served by resolving cases under the class rubric. Congressional silence on *American Pipe*, in the U.S. Code, and in the volumes of legislative history—despite repeated reforms of class actions in general and securities class actions in particular—therefore speaks volumes. Congress could amend Rule 23 to overrule *American Pipe*, or clarify that specific time bars may only be satisfied through the filing of individual actions, not class actions, but has never done so.

Nor are there indications in the legislative history that Congress ever so contemplated. If anything, the few fleeting references to *American Pipe* throughout the legislative history of class action and securities litigation reform statutes that *Amici* are aware of confirm congressional support for this settled judge-made rule of federal civil procedure, one grounded in principles of sound judicial administration.[3]

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[3] *See, e.g.*, H.R. REP. No. 105-702, at 17 (1998) (Report of the H.R. Comm. on the Judiciary on H.R. 3789) (briefly referencing *American Pipe* and clarifying that the Class Action Jurisdiction Act of 1998 preserves its holding, stating, "[i]mportantly, Section Three [of the bill] states that the period of limitations for any claim remanded to the state court on behalf of any member, named or unnamed, of any proposed class shall be tolled to the full extent provided under federal law."); *see also Securities Investor Protection Act of 1991: Hearing on S. 1533 Before the Subcomm. on Securities of the S. Comm. on Banking, Housing, and Urban Affairs*, 102d Cong. 22 n.10 (1992) (statement of Richard C. Breenan, Chairman, US Securities and

Even changes made in 2002 to the hybrid limitations period of Section 9(e) of the 1934 Act (then one-year/three-years, now two-years/five-years) were made with nary a mention of *American Pipe*, in either the statute, or the legislative history. *See* 28 U.S.C. 1658(b); *see also, e.g.*, S. REP. No. 107-146, at 8 (2002). Section 9(e), of course, was the limitations period at issue in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991). There, this Court held that the limitations periods in 9(e) applied to Section 10(b) claims, and in the process, rejected equitable tolling for the longer period, deeming it a statute of repose. *Id.* at 360, 363.

When, in 2002, Congress extended the 9(e) limits, federal courts were consistently holding that *American Pipe* applied to statutes of "repose" in securities actions. *See, e.g., Joseph v. Wiles*, 223 F.3d 1155, 1168 (10th Cir. 2000); *In re Discovery Zone Sec. Litig.*, 181 F.R.D. 582, 600 n.11 (N.D. Ill. 1998); *Salkind v. Wang*, No. CIV.A. 93-10912-WGY, 1995 WL 170122, at *3 (D. Mass. Mar. 30, 1995); *Mott v. R.G. Dickinson & Co.*, No. 92-1450-PFK, 1993 WL 63445, at *5 (D. Kan. Feb. 24, 1993). And they were uniformly applying *American Pipe* to allow "legal tolling" notwithstanding *Lampf*'s foreclosure of equitable tolling. If Congress wanted to set aside the well-established *American Pipe* rule, one can safely assume that it would have done so when amending the very statute of limitations at issue in *Lampf*. But

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Exchange Commission) (referencing *American Pipe* to note that "[i]ndependent of any equitable tolling concepts, courts toll the running of statutes of limitations upon the commencement of class actions for the benefit of the members of the class").

Congress remained silent, yet again implicitly blessing an established procedural regime that is fully consistent with its statutory goals.

In sum, Congress has enacted significant reforms to securities class action procedures and made repeated amendments to general class action procedures without referencing the decades of precedent applying *American Pipe*. Such "long congressional acquiescence" is further reason for this Court to maintain course and hold that *American Pipe* applies to satisfy Section 13's three-year bar for all class members. *Cf. Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401, 2409-2410 (2015) (recognizing the strength of stare decisis in statutory rulings, especially when there is "long congressional acquiescence" in the holding at issue).

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit should be reversed.

Respectfully submitted.

Frank J. Johnson
JOHNSON & WEAVER LLP

Ruthanne M. Deutsch
Counsel of Record
Hyland Hunt
DEUTSCH HUNT PLLC

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CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM,
Petitioner,

v.

ANZ SECURITIES, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Courts of Appeals for the Second Circuit

BRIEF OF DeKALB COUNTY PENSION FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

DAVID R. SCOTT
WILLIAM C. FREDERICKS
GEOFFREY M. JOHNSON
SCOTT+SCOTT, ATTORNEYS AT LAW, LLP
The Helmsley Building
230 Park Avenue
17th Floor
New York, New York 10169
(212) 223-6444

DAVID C. FREDERICK
Counsel of Record
GREGORY G. RAPAWY
JEREMY S. NEWMAN
BENJAMIN S. SOFTNESS
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@kellogghansen.com)

March 6, 2017

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE RULE OF *AMERICAN PIPE* IS AN INTERPRETATION OF FEDERAL RULE OF CIVIL PROCEDURE 23 4

A. *American Pipe* Held That A Rule Requiring Individual Class Members To File Duplicate Protective Actions Is "Inconsistent With Rule 23" 4

B. Subsequent Decisions Of This Court Reinforce The Conclusion That *American Pipe* Interpreted Rule 23 7

C. *American Pipe* Is Not An Application Of Equitable Tolling 10

D. Rule 23, As Interpreted In *American Pipe*, Complies With The Rules Enabling Act 14

II. ANY CHANGE TO *AMERICAN PIPE*'S SETTLED INTERPRETATION OF RULE 23 SHOULD BE ACCOMPLISHED THROUGH THE RULES ENABLING ACT'S PROCEDURE FOR AMENDING THE FEDERAL RULES OF CIVIL PROCEDURE 17

A. As An Interpretation Of Rule 23, *American Pipe* Has Enhanced *Stare Decisis* Effect 17

B. Congress Has Set Forth The Process For Amending Rule 23 18

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) 19

American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974) ..... *passim*

Bailey v. Glover, 88 U.S. (21 Wall.) 342 (1875) 11, 12

Beach v. Ocwen Fed. Bank, 523 U.S. 410 (1998) 16

Chardon v. Fumero Soto, 462 U.S. 650 (1983) 9, 10

Credit Suisse Sec. (USA) LLC v. Simmonds, 566 U.S. 221 (2012) 10, 11

Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983) 8, 9, 10, 13

CTS Corp. v. Waldburger, 134 S. Ct. 2175 (2014) 11, 12

DeKalb Cnty. Pension Fund v. Transocean Ltd., 817 F.3d 393 (2d Cir. 2016), *pet. for cert. pending*, No. 16-206 (filed Aug. 12, 2016) 1

Dickerson v. United States, 530 U.S. 428 (2000) 17

Dungan v. Morgan Drive-Away, Inc., 570 F.2d 867 (9th Cir. 1978)..... 15

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) 7, 10

Faragher v. City of Boca Raton, 524 U.S. 775 (1998) 18

Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322 (1978) 15

Holmberg v. Armbrecht, 327 U.S. 392 (1946) 11

Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401 (2015) 17, 18, 19

Kirtsaeng v. John Wiley & Sons, Inc., 133 S. Ct. 1351 (2013)..... 13

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991) 11

Landgraf v. USI Film Prods., 511 U.S. 244 (1994) 20

Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100 (2009) 19

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 17

Police & Fire Ret. Sys. of Detroit v. IndyMac MBS, Inc., 721 F.3d 95 (2d Cir. 2013) 1, 10, 14

Realmonte v. Reeves, 169 F.3d 1280 (10th Cir. 1999)..... 7

Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010) 15

Sibbach v. Wilson & Co., 312 U.S. 1 (1941).....16, 17

Society for the Propagation of the Gospel v. Wheeler, 22 F. Cas. 756 (C.C.N.H. 1814) (No. 13,156)..... 20

United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977) 8, 10

Utah v. American Pipe & Constr. Co., 50 F.R.D. 99 (C.D. Cal. 1970), *remanded in part*, 473 F.2d 580 (9th Cir. 1973), *aff'd*, 414 U.S. 538 (1974) 15

Walker v. Armco Steel Corp., 446 U.S. 740 (1980) 18

West v. Conrail, 481 U.S. 35 (1987)..... 16

STATUTES AND RULES

Clayton Act, 15 U.S.C. § 12 *et seq.* 4

§ 5(b), 15 U.S.C. § 16(b) (1970).....4, 5, 14

§ 5(i), 15 U.S.C. § 16(i)..... 14

Rules Enabling Act, 28 U.S.C. § 2071 *et seq.* 2, 3, 11, 14, 15, 16, 17, 18, 19, 20

28 U.S.C. § 2072 .....11, 18

28 U.S.C. § 2072(a) 18

28 U.S.C. § 2072(b) 14

28 U.S.C. § 2073 19

28 U.S.C. § 2074 19

28 U.S.C. § 2074(a) 18, 20

Securities Act of 1933, 15 U.S.C. § 77a *et seq.* 3, 14

§ 13, 15 U.S.C. § 77m 3, 14, 15, 16

15 U.S.C. § 1635(f)..... 16

42 U.S.C. § 1983..... 9, 10

42 U.S.C. § 1988..... 9

Fed. R. Civ. P.:

Rule 3 16

Rule 23 .....*passim*

Rule 23(b)(3) 7

Sup. Ct. R.:

Rule 37.3(a)..... 1

Rule 37.6..... 1

OTHER MATERIALS

Hadley Arkes, *A Natural Law Manifesto or an Appeal from the Old Jurisprudence to the New*, 87 Notre Dame L. Rev. 1245 (2012), *available at* http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1024&context=ndlr 12

3B James W. Moore, *Federal Practice* (2d ed.) 5

Stephen R. Munzer, *A Theory of Retroactive Legislation*, 61 Tex. L. Rev. 425 (1982) 20

Petition for a Writ of Certiorari, *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974) (No. 72-1195) (U.S. filed Mar. 2, 1973), 1973 WL 346627 15

A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. Rev. 431 (2008), *available at* http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2383&context=bclr 18

U.S. Courts:

How the Rulemaking Process Works, http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works (last visited Mar. 5, 2017) 19

How to Suggest a Change to the Rules of Practice and Procedure and Forms, http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-suggest-change-rules-practice-and-procedure-and-forms (last visited Mar. 5, 2017) 19

INTEREST OF *AMICUS CURIAE*[1]

Amicus DeKalb County Pension Fund administers a pension plan that manages approximately $1.3 billion in assets on behalf of current and former employees of DeKalb County, Georgia. As part of its duty to protect the retirement savings of participants in the pension plan, *amicus* has participated in class-action lawsuits seeking to recover damages from securities issuers that have violated federal securities laws and caused losses to the fund. Because *amicus* manages the retirement savings of civil servants, *amicus* has a longstanding institutional interest in preserving the viability of the class-action mechanism for protecting the rights of investors — those who, on their own, could not feasibly or economically press a securities lawsuit. In fact, *amicus* has itself been prevented from seeking to recover for losses to its pension plan under the rule announced in *Police & Fire Retirement System of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013), and applied in the proceedings below. *See DeKalb Cnty. Pension Fund v. Transocean Ltd.*, 817 F.3d 393 (2d Cir. 2016), *pet. for cert. pending*, No. 16-206 (filed Aug. 12, 2016).

Petitioner ably demonstrates in its brief why, under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), petitioner's individual complaint was timely

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amicus* also represent that all parties have consented to the filing of this brief by submitting letters granting blanket consent to the filing of *amicus* briefs.

filed and the decision below should be reversed. *Amicus* supports petitioner's arguments in full.

Amicus writes separately to expand upon a critical point and to address the implications of that point for the Court's resolution of this case. Specifically, *amicus* will develop further the explanation why *American Pipe* can properly be understood only as an interpretation and application of Federal Rule of Civil Procedure 23, rather than as a judge-made exception to statutory time limitations. *Amicus* will further explain why, so understood, the rule of *American Pipe* should remain intact unless and until Rule 23 is amended under the procedures Congress provided in the Rules Enabling Act.

SUMMARY OF ARGUMENT

I. This Court explained in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), that the basis for that decision is Federal Rule of Civil Procedure 23. The Court described its opinion as an "interpretation" of the rule and held that a contrary rule requiring repetitive protective filings is "inconsistent with Rule 23." Subsequent decisions of this Court have applied *American Pipe* in a range of procedural circumstances and have explained that the policies underlying Rule 23's text and structure required those outcomes.

American Pipe cannot properly be considered an application of equitable tolling, as the Second Circuit erroneously suggested. Equitable tolling is a case-by-case doctrine that protects specific plaintiffs who, though diligently pursuing their rights, are unable to bring a timely cause of action and put the defendant on notice of their claims. *American Pipe* lacks these characteristics. It is not applied case-by-case, but rather applies to all members of a timely filed putative

class action, notwithstanding any specific plaintiff's diligence. And *American Pipe* does not excuse a plaintiff's failure to put a defendant on notice of a claim. When *American Pipe* applies, the filing of a class complaint has notified the defendant of each plaintiff's claim. There is nothing for equity to excuse.

American Pipe also complies with the Rules Enabling Act, as this Court held in *American Pipe* itself. Section 13 of the Securities Act of 1933 is materially indistinguishable from the statute this Court addressed in that case, and the Second Circuit's contrary conclusion cannot be squared with this Court's Rules Enabling Act precedents.

II. Because *American Pipe* interpreted Rule 23, it is entitled to enhanced "statutory" *stare decisis* effect. The Federal Rules of Civil Procedure are adopted by this Court through a process prescribed by Congress, and they have the force of law. Accordingly, when this Court interprets a federal rule, that interpretation is best reconsidered, if at all, through the rulemaking process Congress provided. Failing to follow that rulemaking process would unfairly penalize injured parties with claims that would have been considered timely and thus litigated on the merits, had the Second Circuit followed *American Pipe*.

ARGUMENT

I. THE RULE OF *AMERICAN PIPE* IS AN INTERPRETATION OF FEDERAL RULE OF CIVIL PROCEDURE 23

A. *American Pipe* Held That A Rule Requiring Individual Class Members To File Duplicate Protective Actions Is "Inconsistent With Rule 23"

In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), this Court interpreted Rule 23 to require that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Id.* at 554.

There, the State of Utah had commenced a putative class action under the federal antitrust laws, alleging that several defendants had conspired in a bid-rigging scheme concerning the sale of concrete and steel pipe. *See id.* at 541. The district court deemed that private action to be timely under § 5(b) of the Clayton Act because it was filed within one year after the conclusion of a civil action brought by the United States. *See id.*[2] After the court granted the defendants' motion for an order that the suit could not be maintained as a class action, a group of municipalities and other local government entities

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[2] Section 5(b) provided that the time for filing a private action under the antitrust laws was "'suspended'" during the pendency, and for one year after the conclusion, of any civil proceeding instituted by the United States; it also stated that, whenever the suspension provision applied, any private action "'shall be forever barred unless commenced . . . within the period of suspension.'" *American Pipe*, 414 U.S. at 541-42 & n.3 (quoting 15 U.S.C. § 16(b) (1970)).

that had been members of the putative class filed motions to intervene as plaintiffs in the case. *See id.* at 542-44. If the filing of Utah's class complaint stopped the running of § 5(b)'s one-year period for the time between that filing and the district court's order denying class certification, then the municipalities' motions to intervene were timely. If, however, the one-year period continued to run against the municipalities despite the filing of the class complaint, then the motions to intervene were time-barred. *See id.* at 544, 561.

This Court held that the intervention motions were timely. That outcome followed from, and reflected an interpretation of, Federal Rule of Civil Procedure 23. As this Court stated in the opinion's very first line, *American Pipe* considered — and resolved — "the relationship between a statute of limitations and the provisions of [Rule] 23 regulating class actions in the federal courts." *Id.* at 540.

As petitioner details, *American Pipe* began by interpreting Rule 23 on the basis of its history and purpose. *See* Pet. Br. 16-19. In its original form, Rule 23 permitted "spurious" class actions binding only upon named parties; the spurious class action was "'merely an invitation to joinder'" that allowed class members to "await developments in the trial or even final judgment on the merits" to decide whether to intervene, so that the class members could "benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one." 414 U.S. at 545-47 (quoting 3B James W. Moore, *Federal Practice* ¶ 23.10[1], at 23-2603 (2d ed.)). The 1966 amendments to Rule 23 "were designed, in part, specifically to mend this perceived defect in the former Rule and to assure that members of the

class would be identified before trial on the merits and would be bound by all subsequent orders and judgments." *Id.* at 547.

Under Rule 23 as amended, the class action was transformed from "an invitation to joinder" into "a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." *Id.* at 550. That purpose could be achieved only if putative class members "stood," as of the filing of the class complaint, "as parties to the suit." *Id.* at 550-51. The Court thus concluded that "the filing of a timely class action complaint commences the action for all members of the class as subsequently determined." *Id.* at 550.[3]

An alternative rule, this Court continued, would not be "consistent with federal class action procedure" under Rule 23 because it would preclude the efficiencies the Rule was adopted to allow. *Id.* at 553-54. The Court thus concluded that a scheme within which class members "must individually meet the timeliness requirements . . . is *simply inconsistent with Rule 23 as presently drafted.*" *Id.* at 550 (emphasis added). The Court determined that its "interpretation of the Rule" was "necessary to insure effectuation of the purposes of litigative efficiency and economy that the Rule in its present form was designed to serve." *Id.* at 555-56.

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[3] Put differently, under Rule 23, a putative class member's later-filed complaint should not be treated as "a separate cause of action which must individually meet the timeliness requirements." *American Pipe*, 414 U.S. at 550; *see* Pet. Br. 30-38.

B. Subsequent Decisions Of This Court Reinforce The Conclusion That *American Pipe* Interpreted Rule 23

Subsequent decisions of this Court have cemented *American Pipe*'s interpretation of Rule 23 as a settled principle of federal civil procedure. Just a few months after *American Pipe* was decided, this Court held in a federal antitrust and securities case that each member of a class certified under Rule 23(b)(3) who can be identified through reasonable effort must receive notice of the right to request exclusion from the suit. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 159, 173-77 (1974). In so holding, the Court rejected the argument that "class members will not opt out because the statute of limitations has long since run out on the claims of all class members other than [the named plaintiff]." *Id.* at 176 n.13. It explained that the argument was "disposed of by our recent decision in" *American Pipe*, "which established that commencement of a class action tolls the applicable statute of limitations as to all members of the class." *Id.*

The Court in *Eisen* thus recognized the critical role *American Pipe* plays in ensuring the proper functioning of Rule 23's provisions affording unnamed class members rights to receive notice and to opt out. Without *American Pipe*, those provisions "would be irrelevant because the statute of limitations period for absent class members would, more often than not, have expired, making the right to pursue individual claims meaningless," as the Tenth Circuit has recognized. *Realmonte v. Reeves*, 169 F.3d 1280, 1284 (10th Cir. 1999); *see* Pet. Br. 10.

Three Terms after *Eisen*, this Court applied *American Pipe*'s interpretation of Rule 23 to hold that an

unnamed class member could intervene after final judgment in an employment-discrimination case to appeal a denial of class certification, even though the remaining time in the limitations period had run between the denial of class certification and the filing of the motion to intervene. *See United Airlines, Inc. v. McDonald*, 432 U.S. 385, 392 n.11, 396 (1977). The Court relied on *American Pipe*, explaining that "[t]he lawsuit had been commenced by the timely filing of a complaint for classwide relief, providing United with 'the essential information necessary to determine both the subject matter and size of the prospective litigation.'" *Id.* at 392-93 (quoting *American Pipe*, 414 U.S. at 555). The Court observed that an alternative rule requiring intervention during the limitations period "would induce putative class members to file protective motions to intervene to guard against the possibility that the named representatives might not appeal from the adverse class determination." *Id.* at 394 n.15. Such filings, the Court said, "would be the very 'multiplicity of activity *which Rule 23 was designed to avoid.*'" *Id.* (quoting *American Pipe*, 414 U.S. at 551) (emphasis added).

In 1983, the Court issued two decisions in which it again reaffirmed and elaborated on *American Pipe*'s interpretation of Rule 23. In *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), the Court held that *American Pipe* applies not only when members of a putative class move to intervene, but also when they file distinct actions after a denial of class certification and "within the time that remains on the limitations period." *Id.* at 346-47. In that case, the original named plaintiffs filed a putative class action alleging employment discrimination, but class certification was

denied and a member of the asserted class subsequently filed his own lawsuit. *See id.* at 347-48.

The Court explained that limiting the *American Pipe* rule to intervention would generate "[m]uch the same inefficiencies" the Court sought to avoid in *American Pipe*. *Id.* at 350. Just as in the case of intervention, the Court explained, "[a] putative class member who fears that class certification may be denied would have every incentive to file a separate action prior to the expiration of his own period of limitations," resulting in "a needless multiplicity of actions — precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid." *Id.* at 350-51.

The same year it decided *Crown, Cork & Seal*, the Court applied *American Pipe*'s interpretation of Rule 23 in a case where state law supplied the limitations period. *See Chardon v. Fumero Soto*, 462 U.S. 650 (1983). The Court explained that *American Pipe* had adopted a "federal rule" that "the statute of limitations is tolled by the filing of an asserted class action" and noted the court of appeals' recognition that *American Pipe* "had interpreted the Federal Rules of Civil Procedure" to permit such tolling. *Id.* at 654, 658. The dissenting Justices in *Chardon* agreed with the majority that *American Pipe* "interpret[ed] Rule 23 to contain a rule that, during the pendency of a class action, underlying statutes of limitations would be tolled as to individual class members." *Id.* at 665 (Rehnquist, J., dissenting); *see id.* at 667-68.[4]

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[4] The plaintiffs' claims in *Chardon* arose under 42 U.S.C. § 1983, and the Court had interpreted 42 U.S.C. § 1988 to require courts to borrow both state statutes of limitations and state rules for tolling those statutes. *See* 462 U.S. at 657. The

This Court's decisions in *Eisen*, *McDonald*, *Crown, Cork & Seal*, and *Chardon* reaffirmed that *American Pipe* is an interpretation of Rule 23 and demonstrate that that interpretation is necessary for Rule 23 to operate as intended in a range of procedural postures. Moreover, as petitioner correctly explains, neither Congress nor this Court has sought to amend Rule 23 to operate any differently in the decades since *American Pipe* was decided. *See* Pet. Br. 21-22. Rather, as recently as 2012, this Court described *American Pipe* as having "based [its] conclusion on 'the efficiency and economy of litigation which is a principal purpose of [Fed. Rule Civ. Proc. 23 class actions].'" *Credit Suisse Sec. (USA) LLC v. Simmonds*, 566 U.S. 221, 226 n.6 (2012) (quoting *American Pipe*, 414 U.S. at 553) (second brackets added in *Credit Suisse*).

C. *American Pipe* Is Not An Application Of Equitable Tolling

The Second Circuit in *Police & Fire Retirement System of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013), professed ambivalence concerning "the source of authority" for *American Pipe* and suggested that it might be an application of equitable tolling. 721 F.3d at 108. It is not. *See* Pet. Br. 18-19. *American Pipe*'s holding derives from statutory, not

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Court held that, in a § 1983 case, the "federal interest in assuring the efficiency and economy of the class-action procedure," embodied in Rule 23, "is vindicated as long as each unnamed plaintiff is given as much time to intervene or file a separate action as he would have under" analogous state law. *Id.* at 661 (footnote omitted). In *Chardon*, that meant applying Puerto Rico's rule providing that the limitations period ran anew from the denial of class certification. *See id.* at 661-62. The dissent would have held that *American Pipe* requires suspension rather than renewal in all cases. *See id.* at 665 (Rehnquist, J., dissenting).

equitable, authority. *American Pipe* relied on an "interpretation" of Rule 23, 414 U.S. at 555-56, which is itself an exercise of this Court's rulemaking power under the Rules Enabling Act, 28 U.S.C. § 2072.

A proper understanding of equitable tolling confirms that *American Pipe* derives from Rule 23, not equity. The principles of equitable tolling have been "long-settled" for centuries. *Credit Suisse*, 566 U.S. at 227. Although courts apply the doctrine in various circumstances, "[g]enerally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way." *Id.* (emphasis omitted); *see CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014) (equitable tolling applies "when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely claim"). For example, equitable tolling may excuse an untimely filing in a fraud case "where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part" or "where the ignorance of the fraud has been produced by affirmative acts of the guilty party." *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 347, 348 (1875); *see also Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991) (citing *Bailey*'s formulation of equitable tolling).

Equitable tolling is thus a case-by-case doctrine concerned with avoiding a specific sort of unfairness in a specific case. *See Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946) (doctrine of equitable tolling "eschews mechanical rules" and seeks to avoid "an inequity founded upon some change in the condition or relations *of the property or the parties*") (emphasis

added). Specifically, it seeks to protect a blameless plaintiff who, in a particular case, filed late due to circumstances beyond his control.[5] In operating this way, equitable tolling *excuses* the usual requirement codified in statutory time bars that defendants be notified of claims against them within a certain time period, when doing so is necessary to ensure fairness to the plaintiff. *Cf. Bailey*, 88 U.S. (21 Wall.) at 349 (observing that allowing a defendant to ensure dismissal by intentionally hiding his fraud during the limitations period would "make the law which was designed to prevent fraud the means by which it is made successful and secure").[6]

American Pipe is unlike equitable tolling in two crucial respects. First, it is not applied case-by-case, plaintiff-by-plaintiff, in an attempt to right wrongs and preserve fundamental fairness. It is a rule of procedure that applies to any member of a putative class, regardless whether the plaintiff acted diligently during the limitations period. As interpreted

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[5] The moral principle underlying equitable tolling is both intuitive and fundamental. *See* Hadley Arkes, *A Natural Law Manifesto or an Appeal from the Old Jurisprudence to the New*, 87 Notre Dame L. Rev. 1245, 1252 (2012) (setting forth "one of the truly 'first principles' we draw from the logic of moral judgment," namely, "that we do not hold people blameworthy or responsible for acts they were powerless to affect"), *available at* http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1024&context=ndlr.

[6] Because equitable tolling is fundamentally concerned with fairness to the *plaintiff*, it is understandable that equitable tolling is incompatible with statutory repose periods, which prioritize the *defendant's* right to achieve peace. *See Waldburger*, 134 S. Ct. at 2183; Pet. Br. 40. *American Pipe*, however, elevates the interests of neither the plaintiff nor the defendant; it furthers the procedural policies of Rule 23. *See* 414 U.S. at 555-56.

in *American Pipe*, "Rule 23 both permits *and encourages* class members to rely on the named plaintiffs to press their claims." *Crown, Cork & Seal*, 462 U.S. at 352-53 (emphasis added). Had equity been its source, the *American Pipe* rule would have been limited to those who reasonably relied on the class-action filing, whereas the Court in *American Pipe* expressly refused to apply a "different . . . standard . . . to those members of the class who did not rely upon the commencement of the class action (or who were even unaware that such a suit existed)." 414 U.S. at 551.

Second, *American Pipe* does not excuse the failure to notify defendants of adverse claims, as does equitable tolling. On the contrary, this Court has recognized that *American Pipe* applies where the filing of a timely class action "'notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs.'" *Crown, Cork & Seal*, 462 U.S. at 353 (quoting *American Pipe*, 414 U.S. at 555); *see also American Pipe*, 414 U.S. at 562 (Blackmun, J., concurring) (claims to which *American Pipe* applies "invariably will concern the same evidence, memories, and witnesses as the subject matter of the original class suit, and the defendant will not be prejudiced by later intervention"). Thus, under *American Pipe*, there is no lack of notice for equity to excuse.[7]

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[7] Passing references to *American Pipe* in a couple of this Court's equitable-tolling decisions provide no basis on which to ignore the fundamental differences between *American Pipe*'s interpretation of Rule 23 and the doctrine of equitable tolling. *Cf. Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1368 (2013) ("Is the Court having once written dicta calling a tomato a vegetable bound to deny that it is a fruit forever after?").

D. Rule 23, As Interpreted In *American Pipe*, Complies With The Rules Enabling Act

American Pipe's interpretation of Rule 23 comports fully with the Rules Enabling Act. In *IndyMac*, the Second Circuit concluded (in the alternative) that applying *American Pipe* to § 13 of the Securities Act of 1933, 15 U.S.C. § 77m, would modify a "*substantive* right" protected by § 13 and thereby violate the Rules Enabling Act. 721 F.3d at 109; *see* 28 U.S.C. § 2072(b) (Federal Rules of Civil Procedure may not "abridge, enlarge or modify any substantive right"). That is incorrect.

American Pipe itself rejected an argument that the "'substantive' element" of the statutory time bar caused the Court's interpretation of Rule 23 to violate the Rules Enabling Act. *See* 414 U.S. at 556-58. "The proper test," the Court explained, "is not whether a time limitation is 'substantive' or 'procedural,' but whether tolling the limitation in a given context is consonant with the legislative scheme." *Id.* at 557-58. Allowing petitioner to pursue claims that were filed on a class-wide basis within the repose period is consonant with § 13 and the policies statutes of repose are intended to further. *See* Pet. Br. 50-51.

In addition, the Second Circuit's conclusion that *American Pipe* implicates the Rules Enabling Act because § 13 is "a statute of repose" defining "a substantive right," *IndyMac*, 721 F.3d at 109 n.17, ignores that § 13 is relevantly indistinguishable from the provision at issue in *American Pipe*. The statute in *American Pipe*, 15 U.S.C. § 16(b) (1970) (now codified at 15 U.S.C. § 16(i)), provided that lawsuits not "commenced" within one year of a government suit under the antitrust laws would be "forever barred." *See* 414 U.S. at 542 n.3. Notably, the one-year period

ran from the conclusion of the government action — a time unrelated to a plaintiff's discovery of a claim. The provision thus bore the same hallmarks that respondents claim characterize "statutes of repose." *See* Br. in Opp. 26.[8] Accordingly, § 13's characteristics as a repose period provide no basis to distinguish this Court's holding in *American Pipe* that its rule was "consonant with the legislative scheme" and did not implicate the Rules Enabling Act. 414 U.S. at 557-58.

The Second Circuit's holding also cannot be squared with this Court's Rules Enabling Act precedents. The Second Circuit's reasoning appears to be: (1) § 13 protects a substantive right; (2) *American Pipe* would affect § 13; therefore, (3) *American Pipe* violates the Rules Enabling Act. But the proper test "is *not* whether the rule affects a litigant's substantive rights; most procedural rules do." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (plurality) (emphasis added). Rather, "[w]hat matters is what the rule itself *regulates*." *Id.* (emphasis added); *see also id.* at 412 n.10 (distinguishing between "what the Federal rule *regulates*

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[8] In fact, the provision at issue in *American Pipe* has been referred to as a "statute of repose." The district court in *American Pipe* called it an "antitrust statute of repose." *Utah v. American Pipe & Constr. Co.*, 50 F.R.D. 99, 103 (C.D. Cal. 1970), *remanded in part*, 473 F.2d 580 (9th Cir. 1973), *aff'd*, 414 U.S. 538 (1974). In their petition for a writ of certiorari, the defendants in that case referred to the provision as a "statute of repose." Pet. for Cert. at 22, *American Pipe*, *supra*, No. 72-1195 (U.S. filed Mar. 2, 1973), 1973 WL 346627. And, four years after *American Pipe*, this Court quoted with approval the Ninth Circuit's description of the provision as "'a statute of repose.'" *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 334 (1978) (quoting *Dungan v. Morgan Drive-Away, Inc.*, 570 F.2d 867, 869 (9th Cir. 1978)).

[and] its incidental *effects*"); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941) ("[t]he test must be whether a rule really regulates procedure"). Here, as petitioner explains, the rule regulates Rule 23's precise *procedural* concern: whether the plaintiff may recover through a distinct lawsuit or only as part of the original class action.[9]

In all events, § 13 does not in fact protect any substantive right for purposes of the Rules Enabling Act. *See* Pet. Br. 50 & n.11. It governs only *when* a lawsuit may be brought. When Congress enacts statutes that create or destroy substantive rights to relief, it does so in clear terms. *See Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 416-17 (1998); *compare* 15 U.S.C. § 77m (governing when a suit may be "brought") *with id.* § 1635(f) ("An obligor's *right* of rescission *shall expire* three years after the date of consummation . . . .") (emphases added). It did not do so here.

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[9] Put differently, *American Pipe* determines what event constitutes the timely filing of a complaint under a federal statutory limitations period. This Court has held that such a determination is procedural and properly made by the Federal Rules. *See West v. Conrail*, 481 U.S. 35, 38-39 (1987) (complaint timely filed under federal statute of limitations because suit was "commenced" as that term was defined under Federal Rule of Civil Procedure 3).

II. ANY CHANGE TO *AMERICAN PIPE*'S SETTLED INTERPRETATION OF RULE 23 SHOULD BE ACCOMPLISHED THROUGH THE RULES ENABLING ACT'S PROCEDURE FOR AMENDING THE FEDERAL RULES OF CIVIL PROCEDURE

A. As An Interpretation Of Rule 23, *American Pipe* Has Enhanced *Stare Decisis* Effect

American Pipe's interpretation of Rule 23 is entitled to great weight under this Court's cases. The Court has held that, while "[o]verruling precedent is never a small matter," *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015), *stare decisis* principles apply with even greater force to decisions interpreting federal statutes, *see Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989). In such cases, "the legislative power is implicated, and Congress remains free to alter" the operation of the federal rule in issue. *Id.* at 172-73. The rationale underlying statutory *stare decisis* is that, when this Court interprets a statute (or a rule), the holding "effectively becomes part of the statutory scheme, subject . . . to congressional change. Absent special justification, they are balls tossed into Congress's court, for acceptance or not as that branch elects." *Kimble*, 135 S. Ct. at 2409.

The same rationale applies to interpretations of the Federal Rules of Civil Procedure. Those rules "ha[ve] the force of a federal statute." *Sibbach*, 312 U.S. at 13. And, just like federal statutes, they can be changed by Congress. *See Dickerson v. United States*, 530 U.S. 428, 437 (2000). Parties unhappy with the way this Court interprets a federal rule can simply "take their objections across the street, and Congress can correct any mistake it sees." *Kimble*,

135 S. Ct. at 2409; *see also Walker v. Armco Steel Corp.*, 446 U.S. 740, 749 (1980) (noting that "the doctrine of *stare decisis* weighs heavily against" overruling a precedent interpreting a Federal Rule of Civil Procedure).

Indeed, the case for enhanced *stare decisis* is even *stronger* in the context of the Federal Rules because this Court, in addition to Congress, is empowered to adopt amendments on its own. *See* 28 U.S.C. §§ 2072(a), 2074(a) (rules proposed by this Court take effect unless Congress provides otherwise by law); *see also* A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. Rev. 431, 462 (2008), *available at* http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2383&context=bclr. And it is stronger still here, where, despite 30 amendments to the Federal Rules since *American Pipe* was decided, the rule of *American Pipe* has remained undisturbed. *See* Pet. Br. 21; *see also Faragher v. City of Boca Raton*, 524 U.S. 775, 792 (1998) (force of statutory *stare decisis* is "enhanced" when Congress amends a statute "without providing any modification of [this Court's] holding").

"As against this superpowered form of *stare decisis*," respondents "would need a superspecial justification to warrant" abrogating *American Pipe*. *Kimble*, 135 S. Ct. at 2410; *see id.* at 2409 (such a justification must rise "above the belief that the precedent was wrongly decided"). They have presented no such justification.

B. Congress Has Set Forth The Process For Amending Rule 23

The Rules Enabling Act authorizes this Court to prescribe rules of procedure for cases in the United States district courts. *See* 28 U.S.C. § 2072. It also provides for the method of prescribing those rules,

see id. § 2073, and for the submission of rules to Congress before they take effect, *see id.* § 2074.

In exercising the rulemaking authority Congress granted, this Court promulgates rules of civil procedure through a "committee process" that invites input from judges, scholars, government agencies, and members of the bar and the public.[10] Interested parties can submit suggestions for changes to the rules.[11] "Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

Observing the rulemaking process when altering the way Federal Rules operate honors the statutory *stare decisis* principles described above. This Court's initial interpretation of a rule puts the ball in "Congress's court, for acceptance or not as that branch elects." *Kimble*, 135 S. Ct. at 2409. And Congress exercises that prerogative through the process it prescribed in the Rules Enabling Act. *Cf. Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 114-19 (2009) (Thomas, J., concurring in part and concurring in the judgment) (questions committed to the Court's Rules Enabling Act authority best addressed through the "full airing that rulemaking provides").

Additionally, declining to follow *American Pipe*'s interpretation of Rule 23 in this case would retro-

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[10] U.S. Courts, *How the Rulemaking Process Works*, http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works (last visited Mar. 5, 2017).

[11] *See* U.S. Courts, *How to Suggest a Change to the Rules of Practice and Procedure and Forms*, http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-suggest-change-rules-practice-and-procedure-and-forms (last visited Mar. 5, 2017).

actively deprive petitioner (and similarly situated plaintiffs, such as *amicus*) of the ability to have their claims adjudicated on the merits. Such an outcome would violate "[e]lementary considerations of fairness," which "dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994); *see also id.* ("settled expectations should not be lightly disrupted"). The Rules Enabling Act mitigates this sort of unfairness by inserting a delay between a rule's adoption and its taking effect and by permitting this Court to prevent a new rule from applying to pending proceedings where "the application of such rule in such proceedings would not be feasible or would work injustice." 28 U.S.C. § 2074(a).[12]

Beyond upsetting the settled expectations of petitioner, a retroactive change to *American Pipe* would grant respondents an unjustifiable windfall. Under *American Pipe*, Rule 23 has long protected the ability of putative class members to press their own lawsuits where a timely class complaint has been filed. With notice of a change in the Rule (or had the Second Circuit not refused to follow *American Pipe*'s inter-

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[12] As this Court has recognized, the law has long disfavored changes in law that "attach[] a new disability[] in respect to transactions or considerations already past." *Society for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.N.H. 1814) (No. 13,156) (Story, J.); *see also Landgraf*, 511 U.S. at 265 ("[T]he principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal."); Stephen R. Munzer, *A Theory of Retroactive Legislation*, 61 Tex. L. Rev. 425, 471 (1982) ("The rule of law . . . is a defeasible entitlement of persons to have their behavior governed by rules publicly fixed in advance.").

pretation of Rule 23), petitioner would have filed the requisite protective action and would presumably have recovered for its injuries. *Cf.* Pet. Br. 14 (noting that respondents settled with the class members that did not opt out). Yet, rather than suggest a change to the Committee on Rules of Practice and Procedure,[13] respondents seek a change in class-action procedure that would amount to immunity from liability in this and other pending cases.

CONCLUSION

The judgment of the court of appeals should be reversed.

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[13] *See* U.S. Courts, *How To Suggest a Change to the Rules of Practice and Procedure and Forms*, http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-suggest-change-rules-practice-and-procedure-and-forms (last visited Mar. 5, 2017).

Respectfully submitted,

DAVID R. SCOTT
WILLIAM C. FREDERICKS
GEOFFREY M. JOHNSON
SCOTT+SCOTT, ATTORNEYS AT LAW, LLP
The Helmsley Building
230 Park Avenue
17th Floor
New York, New York 10169
(212) 223-6444

March 6, 2017

DAVID C. FREDERICK
Counsel of Record
GREGORY G. RAPAWY
JEREMY S. NEWMAN
BENJAMIN S. SOFTNESS
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@kellogghansen.com)

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In the Supreme Court of the United States

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, PETITIONER

v.

ANZ SECURITIES, INC., RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF INSTITUTIONAL INVESTORS AS AMICI CURIAE SUPPORTING PETITIONER

MAX W. BERGER
Counsel of Record
SALVATORE J. GRAZIANO
BERNSTEIN LITOWITZ
BERGER & GROSSMANN LLP
1251 AVENUE OF THE
AMERICAS, 44TH FLOOR
NEW YORK, NY 10020
(212) 554-1400
MAX@BLBGLAW.COM

BLAIR NICHOLAS
BERNSTEIN LITOWITZ
BERGER & GROSSMANN LLP
12481 HIGH BLUFF DRIVE
SAN DIEGO, CA 92130
(858) 793-0070

ROBERT D. KLAUSNER
KLAUSNER, KAUFMAN, JENSEN
& LEVINSON
7080 NW 4TH STREET
PLANTATION, FL 33317
(954) 916-1202

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the filing of a putative class action within three years after a security was offered or sold to the public serves, under the rule of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), to satisfy the three-year time limitation in § 13 of the Securities Act of 1933, 15 U.S.C. § 77m, with respect to the claims of putative class members.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICI 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

THE *AMERICAN PIPE* RULE AVOIDS WASTE AND MULTIPLICITY OF ACTIONS AND IS ESSENTIAL TO REALIZE THE BENEFITS OF EFFICIENCY OF CLASS ACTIONS

A. Institutional Investors Have an Obligation to Protect the Funds with Which They Have Been Entrusted 6

B. Holding *American Pipe* Inapplicable to the Three-Year Limitations Period Under the Securities Act and the Five-Year Period Under the Exchange Act Imposes Wasteful and Unnecessary Nonlitigation Costs on Institutional Investors 8

C. Holding *American Pipe* Inapplicable Imposes Even More Wasteful and Unnecessary Litigation Costs on All Parties to the Litigation and on the Judicial System 15

D. The Rationales for the *American Pipe* Rule Apply Equally Here 24

CONCLUSION 26

APPENDIX—LIST OF AMICI CURIAE

TABLE OF AUTHORITIES

Page(s)

Cases

American Pipe & Construction Co. v. Utah,
414 U.S. 538 (1974) .....*passim*

Amgen Inc. v. Conn. Ret. Plans & Trust Funds,
133 S. Ct. 1184 (2013).....22

In re Bank of New York Derivative Litig.,
320 F.3d 291 (2d Cir. 2003) 17, 18

Comcast Corp. v. Behrend,
133 S. Ct. 1426 (2013).....9, 11, 13, 15

Crown, Cork & Seal Co. v. Parker,
462 U.S. 345 (1983) 10, 17, 21, 22, 24, 25

In re Direxion Shares ETF Trust,
279 F.R.D. 221 (S.D.N.Y. 2012).....18

Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (1974).....21

Eisenberg v. Gagnon,
766 F.2d 770 (3d Cir. 1985) 24

Erica P. John Fund, Inc. v. Halliburton Co.,
563 U.S. 804 (2011).....14

Halliburton Co. v. Erica P. John Fund, Inc.,
134 S. Ct. 2398 (2014) 9-10, 13, 15

Hildes v. Arthur Andersen LLP,
734 F.3d 854 (9th Cir. 2013) 6

Joseph v. Wiles,
223 F.3d 1155 (10th Cir. 2000) 21

Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach,
523 U.S. 26 (1998) 20

Maracich v. Spears,
133 S. Ct. 2191 (2013) 14

Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit,
547 U.S. 71 (2006) 23

Morrison v. Nat'l Australia Bank,
561 U.S. 247 (2010) 14

In re Petrobras Sec. Litig.,
152 F. Supp. 3d 186 (S.D.N.Y. 2016) 16

In re Petrobras Sec. Litig.,
312 F.R.D. 354 (S.D.N.Y. 2016) 16

In re Petrobras Sec. Litig.,
No. MDL 2728, 2016 WL 4153597
(J.P.M.L. Aug. 5, 2016) 20

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) 21

Police & Fire Retirement System of the City of Detroit v. IndyMac MBS, Inc.,
721 F.3d 95 (2d Cir. 2013) 16

Realmonte v. Reeves,
169 F.3d 1280 (10th Cir. 1999) 21

Tellabs, Inc. v. Makor Issues & Rights, Ltd.,
551 U.S. 308 (2007) 23

Vanguard Specialized Funds v. VEREIT Inc.,
No. CV-15-02157-PHX-ROS,
2016 WL 5858735 (D. Ariz. Oct. 3, 2016) 20

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011) 9, 11, 13, 15, 21

Yang v. Odom,
392 F.3d 97 (3d Cir. 2004) 23-24

Statutes and Rules

Civil Rights Act of 1964, Title VII 24

Clayton Antitrust Act of 1914 24

Employee Retirement Income Security Act of 1974 7

29 U.S.C. § 1104(a)(1)(A) 7

29 U.S.C. § 1104(a)(1)(B) 7

Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) 22, 23

Securities Act of 1933 ..... 2, 3, 4, 12, 16

§ 11, 15 U.S.C. § 77k 8, 9

§ 12, 15 U.S.C. § 77*l* 8, 9

§ 13, 15 U.S.C. § 77m 2, 8, 24

§ 27(a)(3)(B)(iii)(I), 15 U.S.C. § 77z-1(a)(3)(B)(iii)(I) 23

Securities Exchange Act of 1934 ..... 2, 3, 4, 12, 16, 24

§ 20A(b)(4), 15 U.S.C. § 78t-1(b)(4) 2-3

§ 21D(a)(3)(B)(iii)(I), 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I) 23

Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (1998) 23

28 U.S.C. § 1404(a) 19

28 U.S.C. § 1407(a) 19, 20

28 U.S.C. § 1658(b) 2, 9

Fed. R. Civ. P. 23 ..... 4, 9, 11, 22

Fed. R. Civ. P. 23(b)(3) 20

Fed. R. Civ. P. 23(c)(1)(C) 14

Fed. R. Civ. P. 23(c)(2) 21

Fed. R. Civ. P. 23(c)(2)(B)(v) 20

Fed. R. Civ. P. 23(e)(4) 15

Fed. R. Civ. P. 23(f) 15

Fed. R. Civ. P. 24 16

Fed. R. Civ. P. 24(a) 16

Fed. R. Civ. P. 24(b) 17

Fed. R. Civ. P. 24(b)(1) 17

Fed. R. Civ. P. 24(b)(3) 17

Securities and Exchange Commission
Rule 10b-5, 17 C.F.R. § 240.10b-5 ..... 9, 14

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Law Professors as Amici Curiae,
Pub. Emps.' Ret. Sys. of Miss. v.
IndyMac MBS, Inc.,
No. 13-640, 2013 WL 8114524
(U.S. filed Dec. 26, 2013) 9

Brief of Defendants-Appellants Petróleo Brasileiro S.A.-Petrobras, et al., *Univs. Superannuation Scheme Ltd. v. Petróleo Brasileiro S.A.-Petrobras*, No. 16-1914-cv (2d Cir. filed July 21, 2016) 15

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In the Supreme Court of the United States

No. 16-373

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, PETITIONER

v.

ANZ SECURITIES, INC., RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF INSTITUTIONAL INVESTORS AS AMICI CURIAE SUPPORTING PETITIONER

INTEREST OF THE AMICI

This brief is submitted on behalf of 75 institutional investors, which are identified in the appendix, and the National Conference on Public Employee Retirement Systems ("NCPERS").[1]

[1] The parties have consented to the filing of all briefs of amici curiae. No counsel for a party authored this brief in whole or in part, and neither counsel for a party nor a party made a monetary contribution intended to fund the preparation or submission

The institutional-investor amici curiae are public pension funds and other institutional investors that have over $4 trillion of assets under management and are responsible for investing the retirement funds and other investments of millions of people in publicly traded US securities. Amici have a strong interest in the effective enforcement of the securities laws, to deter fraud and to ensure compensation for those injured by violations of these laws.

NCPERS is the largest national, non-profit public pension trade association, with a membership that includes over 500 pension funds representing in excess of $2 trillion in assets. Since 1941, NCPERS has worked to protect the pensions of public employees. Because of NCPERS' interest in preserving retirement benefits for public employees, it is very concerned about fraudulent practices in the securities industry and the nation's capital markets. NCPERS recognizes the need to combat securities fraud and restrain corporate excess and appreciates the role of private securities class actions in providing a means to deter corporate wrongdoing and compensate victims of securities fraud.

Amici believe that the *American Pipe* rule is part of a reasonable procedural framework for litigation of securities class actions. Amici are concerned that, if the *American Pipe* rule were held to be inapplicable to the three-year limitations period applicable to claims under the Securities Act of 1933 under 15 U.S.C. § 77m (and the analogous five-year limitations period

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of this brief. No person other than amici curiae or their counsel made a monetary contribution to its preparation or submission.

applicable to claims under the Securities Exchange Act of 1934 under 28 U.S.C. § 1658(b)(2) and 15 U.S.C. § 78t-1(b)(4)), amici would incur significant expenses and would have to involve themselves in wasteful and duplicative litigation as a protective measure whenever, as is often the case, the applicable limitations period approaches with no decision on class certification. Indeed, these consequences are already occurring in the circuits that have held that *American Pipe* does not apply to the three-year limitations period under the Securities Act and the five-year limitations period under the Exchange Act, as well as in circuits that have not yet decided the question, rendering *American Pipe* protection uncertain. The result is additional costs for all involved, including defendants and the courts, with no compensating benefits to any of the interests Congress was trying to protect in enacting these limitations periods.

SUMMARY OF ARGUMENT

The *American Pipe* rule is part of a sound structure of class and individual litigation, and it is particularly important to institutional investors. Because they are entrusted by millions of people with funds to invest, institutional investors frequently have substantial amounts at stake in securities class actions. They therefore have to be concerned with any rule that would put their claims in jeopardy on the ground that the class-certification motion is not decided until after a limitations period has run. Under *American Pipe*, that possibility creates no problem, because institutional investors may still preserve their claims; if class certification is denied after the limitations period, they may intervene or file their own claims at

that time. But without the *American Pipe* rule, institutional investors frequently have sufficient stakes in the claims to make it advisable for them to take expensive and burdensome steps to preserve their claims in case the class is not ultimately certified.

Initially, without *American Pipe*, institutional investors have to monitor and analyze a large number of pre-certification class actions in distant forums around the country to ensure that the limitations period does not run without a decision on class certification. In addition to the costs of monitoring and analysis, institutional investors frequently have to intervene or file their own claims in the many cases in which the limitations period ends with no decision on class certification. These burdens on institutional investors are already occurring in the circuits that have held that the *American Pipe* rule does not apply to the three-year and five-year limitations periods under the Securities Act and the Exchange Act, respectively, and in circuits that have not decided the question.

Intervention itself can trigger an extra round of litigation on the intervention motion. If the intervention is successful, the ensuing litigation becomes more complex and costly for all parties, as the intervenors (and multiple institutional investors may intervene) participate at each step of the litigation.

Alternatively, institutional investors can file their own actions, perhaps in distant forums. That too imposes costs on all parties, as each individual case proceeds separately through motion practice, discovery, summary judgment, trial, and appeals. Multiplying litigation in that way is contrary to the purpose of Rule 23 of the Federal Rules of Civil Procedure and

otherwise wasteful, since the separate actions serve simply to protect against the possibility that the class might ultimately not be certified. Thus, the *American Pipe* rule, which avoids unnecessary expenses and the multiplication of parties and lawsuits, is sound.

Furthermore, courts can revisit class certification at any time. Therefore, even if a class is certified within the applicable limitations periods, institutional investors must consider in the absence of *American Pipe* protection whether to take affirmative steps to protect against potential *decertification* of the class after a limitations period has run. Finally, investors may be provided a second opportunity to opt out, for example, in connection with a proposed class settlement. Because class actions are commonly settled after the expiration of the applicable limitations periods, institutional investors must seriously consider taking early affirmative action to prevent a renewed opt-out right in connection with a settlement from becoming meaningless.

ARGUMENT

THE *AMERICAN PIPE* RULE AVOIDS WASTE AND MULTIPLICITY OF ACTIONS AND IS ESSENTIAL TO REALIZE THE BENEFITS OF EFFICIENCY OF CLASS ACTIONS

The *American Pipe* rule is part of a sound structure of class and individual litigation. *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974). The basic principle of class litigation is that those who bring class actions act on behalf of the class, and the putative class members need not appear or participate in the action to protect their legal rights. The *American*

Pipe rule fulfills that principle by eliminating the need—which is particularly pressing for institutional investors that often have large stakes in the action—to engage in wasteful protective efforts and litigation that will all prove unnecessary if class certification is granted. Accordingly, *American Pipe* saves the time and resources of putative class members, the other parties to the case, and the judicial system itself.

A. Institutional Investors Have an Obligation to Protect the Funds with Which They Have Been Entrusted

Amici (as well as other institutional investors) invest billions of dollars in the public securities markets, on behalf of millions of beneficiaries.[2] While most individual, nonprofessional investors do not have a large interest in any single security, the pools of funds invested by institutional investors are large enough that their holdings of a given security are often substantial. Therefore, when a securities fraud or other violation causes losses to those who hold a particular issuer's securities, the loss suffered by a given institutional investor can also be substantial.[3]

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[2] Amici are public pension funds and other institutional investors. For convenience, this brief refers to all of those on whose behalf amici manage funds as "beneficiaries."

[3] Of course, some individual investors do have large interests in a single security. For example, entrepreneurs often sell their privately held companies to public companies for stock, thus becoming large holders of the acquirers' stock, and may become members of the class in a class action if the acquirer turns out to have violated the securities laws. *See, e.g.*, *Hildes v. Arthur Andersen LLP*, 734 F.3d 854 (9th Cir. 2013). All of the arguments in this brief concerning institutional investors' need, in the absence of *American Pipe* tolling, to protect their rights through

Institutional investors are stewards of the resources of their beneficiaries. In many cases, laws such as ERISA impose specific fiduciary duties on institutional investors to act "for the exclusive purpose of . . . providing benefits to participants and their beneficiaries," 29 U.S.C. § 1104(a)(1)(A), and to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims," 29 U.S.C. § 1104(a)(1)(B).

Even aside from statutory obligations like these, institutional investors are responsible for the funds they invest for their beneficiaries and take that responsibility seriously. Accordingly, they are necessarily involved in seeing to it that losses from illegal activity are recompensed when possible. While institutional investors would prefer to devote their time and resources to sound investment of the funds entrusted to them, they cannot disregard the losses caused to their funds by violations of the securities laws; they must consider whether action should be taken to recoup those losses through individual securities suits or class actions. Any rule that requires greater and unnecessary expense and wasteful participation in litigation to obtain compensation for the victims of securities violations will have a great adverse impact on institutional investors.

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expensive monitoring and individual litigation apply equally to individual investors with claims large enough to justify individual actions.

B. Holding *American Pipe* Inapplicable to the Three-Year Limitations Period Under the Securities Act and the Five-Year Period Under the Exchange Act Imposes Wasteful and Unnecessary Nonlitigation Costs on Institutional Investors

1. This case involves claims arising under Sections 11 and 12 of the Securities Act of 1933, 15 U.S.C. §§ 77k, 77*l*. These provisions prohibit materially untrue statements and omissions in registration statements and prospectuses issued in connection with the sale of securities. Section 13 of the Securities Act provides two time limits for bringing suit for violations of Sections 11 and 12. First, suit must be "brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence." 15 U.S.C. § 77m. Second, "[i]n no event shall any such action be brought to enforce a liability created under section 11 or section 12(a)(1) more than three years after the security was bona fide offered to the public, or under section 12(a)(2) more than three years after the sale." *Id.* The second time limit—three years after the offering or sale—is at issue in this case.

2. The untrue statements or omissions that are the basis of suits under Sections 11 and 12 are frequently not detected until well after the subject offering or sale, and thus well into the three-year period. And litigation over class certification may move slowly. In a brief filed at the certiorari stage of the *IndyMac* case (in which this Court granted the writ with respect to the same question presented here, but then dismissed the writ after the action was settled), amici Civil Procedure and Securities Law Professors presented an

empirical analysis of how long it takes for securities class actions to reach a class-certification order. They concluded that in approximately half of the Section 11 and 12 cases (and in 83% of the cases that reached a certification order), the three-year period would have expired before the court reached a certification order. *See* Br. of Civ. Pro. & Sec. L. Profs. as Amici Curiae in Support of Pet. for a Writ of Cert., *Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, No. 13-640, 2013 WL 8114524, at *8 (U.S. filed Dec. 26, 2013). Applying the same analysis, approximately one-fourth of Rule 10b-5 class actions (and 76% of the actions that reached a certification order), which also could be affected by the decision in this case, do not reach class certification before the five-year limitations period under 28 U.S.C. § 1658(b) expires. *See id.* at *9. For securities class actions as a whole, amici professors estimated that at least one-fourth of the cases fail to reach class-certification decisions before those or comparable limitations periods expire. *See id.* at *10. There is reason to believe that this estimate is conservative. *See id.* at *10-11.

The length of time until a class-certification decision is reached in a case has likely increased over the years. Recent decisions of this Court have made class certification a more complex enterprise. In both *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), the Court emphasized the need for the plaintiff to prove facts necessary to establish that class certification satisfies the requirements of Rule 23, even when those facts overlap substantially with the merits of the underlying claim. *See Wal-Mart*, 564 U.S. at 349-51; *Comcast*, 133 S. Ct. at 1432. And in *Halliburton*

Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398 (2014) ("*Halliburton II*"), the Court held that in 10b-5 class actions where (as is essentially always the case) the plaintiff seeks to rely on the fraud-on-the-market presumption of reliance, defendants may seek "to defeat the presumption at the class certification stage through evidence that the misrepresentation did not in fact affect the stock price." *Id.* at 2414. Accordingly, these decisions have increased the complexity of class-certification motions, and, hence, are likely to increase the amount of time it will take before the certification decision can be made. These decisions may also increase the risk that even if a class is certified before the applicable limitations periods have run, the class may later be decertified after the limitations periods have run.

3. Under the *American Pipe* rule, the frequent expiration of the limitations period before a class-certification decision does not impose any special burden on institutional investors. While their securities holdings frequently make them members of the putative classes at issue, institutional investors may rely on the commencement of a class action to satisfy the applicable time limits. To be sure, even under *American Pipe*, institutional investors may ultimately have to consider whether to bring their own cases raising similar claims, if class certification is denied. But they need not act speculatively and protectively *before* a class-certification decision. They may instead wait until there is a decision denying class certification and take appropriate action then. *See Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983).

Indeed, many institutional investors prefer, in most securities cases in which they have significant financial interests, to remain members of the class and not intervene or file separate actions. There are a number of reasons for this. First, unlike remaining a passive class member, intervening or filing an individual action imposes costs and expenses of litigation and also imposes burdens on management, who must monitor the litigation. Second, an intervenor or separate plaintiff must produce documents in discovery, answer interrogatories, and provide witnesses for deposition, whereas absent class members are not ordinarily subject to discovery. Third, an intervenor or plaintiff loses confidentiality, whereas other class members are not ordinarily publicly named. Thus, remaining in the class commonly has advantages for institutional investors.

Without the protection of *American Pipe*, however, institutional investors are not able to wait until class certification is denied to determine whether to intervene or file their own suit. The only way for them to protect their beneficiaries' interests in each case in which they have significant losses is to engage in ongoing monitoring of the status of class certification and the nearness of the limitations date as the case is being litigated. They also have to analyze each case at these early stages to determine the strength of their claims, the likelihood of prevailing, the potential damages recovery, and their stake in that recovery. They even have to analyze the named plaintiff's standing to bring the claims, the plaintiff's adequacy and typicality under Rule 23, and the claims' commonality under *Wal-Mart* and *Comcast* to assess the plaintiff's chances of prevailing on class certification. Only by

monitoring and analyzing all of these complex aspects of the case can they determine whether their interest in the case and the odds of class certification warrant taking protective action—intervention or filing a separate suit—as the three-year time limit in a Securities Act case (or the five-year time limit in an Exchange Act case) approaches without class certification. And this monitoring, which requires management time and may require payment of legal and expert fees, is burdensome and expensive.

Even keeping track of relevant limitations periods in securities class actions can be complex and burdensome, as the periods are generally measured from the date of each alleged misstatement or material omission, and a single case may involve numerous alleged misstatements and omissions. The dates of all of the alleged misstatements and omissions must then be cross-referenced against the institutional investor's individual trading in the relevant security to determine whether the expiration of each limitations period is material to the investor, and thus whether intervention or individual litigation is warranted, and at what point in time.

4. From 1997 through 2015, an average of slightly fewer than 190 securities class actions were filed each year.[4] From 2001 through 2015, an average of 5.2% of the large, publicly traded companies in the S&P 500 index, in which many institutional investors have

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[4] *See* Cornerstone Research, *Securities Class Action Filings: 2016 Year in Review* 1 (2017), *available at www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2016-YIR*. This number was a historically high 270 in 2016. *See id.*

substantial interests, were subject to new federal securities class actions in each year.[5] Without the protection of *American Pipe*, merely monitoring each case in which an institutional investor might be interested to ensure that the three-year (or other) limitations period does not expire before class certification imposes a serious and costly burden. Keeping track of the progress of litigation in large numbers of distant cases is not an easy task in any event. It is particularly hard when the institutional investor, as a potential class member, is not a participant in the proceedings. *See Am. Pipe*, 414 U.S. at 552 ("Not until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it."). Keeping track of the expiration of the limitations period itself can be challenging, as complaints frequently charge a number of different events, each of which may be the triggering date for the limitations period. Moreover, complaints can be amended as litigation progresses, which can in turn affect the limitations period.

Aside from monitoring, without the *American Pipe* rule, institutional investors have to analyze each case in order to determine whether intervening in the class suit or filing an independent suit would be warranted. As a case progresses, the scope of the claims and the likelihood of success are frequently clarified—including, especially after *Wal-Mart*, *Comcast*, and *Halliburton II*, in the process of class certification.

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[5] *See id.* at 23. This percentage was a historically high 8.4% in 2016. *See id.*

Indeed, some issues that may be decided at or before the class-certification stage may be dispositive of the entire case. If, for example, the class-certification proceedings establish that an asserted misstatement in a Rule 10b-5 case was not publicly known, that would likely doom even an individual action claiming that a fraudulent statement affected the market price at which the plaintiff bought or sold the security. *See Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011). Or if a motion to dismiss or other dispositive motion in the class action were decided before class certification, once again the investor would know that an individual case raising the same claim would likely fail. *See, e.g., Maracich v. Spears*, 133 S. Ct. 2191 (2013) (vacating denial of pre-certification motion to dismiss); *Morrison v. Nat'l Australia Bank*, 561 U.S. 247 (2010) (affirming grant of pre-certification motion to dismiss). Without the *American Pipe* rule, institutional investors do not have the benefit of these rulings in determining their stake in the case. Engaging in that kind of analysis of each of the possibly several hundred pending and not-yet-certified class actions in which the institutional investor has a substantial interest is very costly and, if class certification is ultimately granted, entirely unnecessary.

Finally, courts can revisit class certification at any time. *See* Fed. R. Civ. P. 23(c)(1)(C). Therefore, even if a class is certified within the applicable limitations periods, institutional investors must consider in the absence of *American Pipe* protection whether to take affirmative steps to protect against potential *decertification* of the class after a limitations period has run—including as a result of the concerns articulated

in *Wal-Mart*, *Comcast*, and *Halliburton II*. Alternatively, courts may provide investors with a renewed opportunity to opt out, such as in connection with a proposed class settlement. *See* Fed. R. Civ. P. 23(e)(4). Because class actions are commonly settled after the expiration of the applicable limitations periods, institutional investors must seriously consider taking affirmative (yet potentially unnecessary) action to preserve their potential right to opt out of a possible class settlement they may consider inadequate.

C. Holding *American Pipe* Inapplicable Imposes Even More Wasteful and Unnecessary Litigation Costs on All Parties to the Litigation and on the Judicial System

In the circuits where institutional investors cannot rely on the *American Pipe* rule, the increased and unnecessary costs consist not merely in the increased expense of monitoring and analyzing pending class actions. The costs also include increased and wasteful litigation. The costs of that litigation are borne not merely by institutional investors, but by all involved, including the other parties to the case and the judicial system itself.

For example, in one currently pending securities-fraud class action in the Second Circuit, approximately 500 institutional investors (and their managed funds and accounts) filed individual actions that are proceeding alongside a class action (in which a Rule 23(f) appeal is now pending). *See Univs. Superannuation Scheme Ltd. v. Petróleo Brasileiro S.A.-Petrobras*, No. 16-1914-cv, Brief of Defendants-Appellants Petróleo Brasileiro S.A.-Petrobras, et al., at *6

(2d Cir. filed July 21, 2016). These institutional investors were obligated to file individual actions because the class period in the *Petrobras* case, which involves an alleged "multi-year . . . bribery and kickback scheme," is five-and-a-half years long—January 22, 2010 to July 28, 2015. *In re Petrobras Sec. Litig.*, 312 F.R.D. 354, 357 (S.D.N.Y. 2016). The class was not certified, however, until February 2016, more than six years after the start of the alleged fraud. *See id.* As a result, there was a serious risk that the three-year and five-year limitations periods for Securities Act and Exchange Act claims, respectively, would expire before the class was certified. Indeed, some institutional investors that filed individual actions had their Securities Act and Exchange Act claims dismissed for that reason as a result of the Second Circuit's intervening decision in *Police & Fire Retirement System of the City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013). *See In re Petrobras Sec. Litig.*, 152 F. Supp. 3d 186, 198-99 (S.D.N.Y. 2016). But hundreds of others filed timely individual actions in light of *IndyMac*. Thus, the burdensome multiplication of individual actions as a result of the Second Circuit's refusal to apply *American Pipe* to securities actions is no mere specter, but a reality.

1. As discussed above, class-certification decisions frequently do not take place until after the three-year or other relevant limitations period has passed. If *American Pipe* did not apply to that period, class-certification decisions would likely be delayed even longer, because defendants would have an incentive to prolong pre-certification discovery and other litigation in the hope that denial of certification would

leave absent class members unable to pursue any individual remedies. Yet whenever that limitations period comes close to expiration, institutional investors that want to preserve their interests face significant pressure either to intervene in the class action or to file their own cases. Either alternative requires the institutional investors to retain counsel to file the necessary papers and conduct the proceedings, which itself would be a needless expense in the large number of cases in which the class is ultimately certified. Moreover, unnecessary intervention motions and the filing of unnecessary new cases, perhaps in distant forums, themselves create new, wasteful, and duplicative tangles.

2. *Intervention.* Before a class is certified, putative class members who want to appear in the case must intervene under Rule 24. As this Court has explained, "[p]utative class members frequently are not entitled to intervene as of right under Fed. R. Civ. P. 24(a), and permissive intervention under Fed. R. Civ. P. 24(b) may be denied in the discretion of the District Court." *Crown, Cork & Seal*, 462 U.S. at 350 n.4. Specifically, although a court "*may* permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact," Fed. R. Civ. P. 24(b)(1) (emphasis added), permitting intervention is discretionary. "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Courts also consider the length of time the prospective intervenor delayed after having notice of the litigation before seeking intervention. *See In re*

Bank of New York Derivative Litig., 320 F.3d 291, 300 (2d Cir. 2003).

Defendants in securities cases are likely not to welcome intervention, which can only increase the cost and complexity of the litigation. The named plaintiffs too may not want to be joined by intervenors, who may well have different ideas from the named plaintiffs (and, perhaps, from each other) about how the litigation should be conducted. As a result, the bases for intervention may become fertile grounds for litigation. Parties may dispute how much delay is too much, *see, e.g.*, *In re Direxion Shares ETF Trust*, 279 F.R.D. 221, 234-36 (S.D.N.Y. 2012), and whether they will suffer prejudice, *see, e.g.*, *In re Bank of New York Derivative Litig.*, 320 F.3d at 300.

Moreover, if intervention is granted, not only the intervenors but also the existing parties will likely incur increased costs. The intervenors will likely seek to take discovery from the defendants and third parties and will be subject to discovery by the other parties. Motion practice and timing will become more complicated, because there are more parties involved in the proceedings. Once the intervenors are full parties to the action, they may well have different strategic or substantive approaches than the named plaintiff; having invested the resources to become parties, the intervenors may decide to contend vigorously for their own procedural and substantive preferences. Even if class certification is ultimately granted, enabling the intervenors to revert to being passive class members, institutional investors that have already devoted resources to intervening and litigating a case may well decide to continue as active plaintiffs. The result of all

this can only be increased costs and complexity for all parties and the court.

This "multiplicity of activity," *Am. Pipe*, 414 U.S. at 551, may be particularly costly because there could easily be more than one intervenor in a case. Especially if the case involves a large, widely held security, many institutional investors are likely to have significant stakes in the litigation that warrant protection. Without the ability to rely on a class action to prevent claims from becoming time-barred, multiple interventions in a given case could easily occur.

3. *Filing independent actions.* Alternatively, institutional investors that are faced with a looming end to the limitations period and no decision on class certification may choose to file their own actions. But once an institutional litigant is faced with the expense of retaining counsel and litigating its own claim, it may well choose a forum that is more convenient for it than the one chosen by class counsel, and it may also choose to frame its action in a way that differs from the class action. Each new complaint of course would trigger a new round of litigation: motions to transfer, motions to dismiss, answers, discovery, *Daubert* hearings, summary judgment, etc. The result could easily be a series of overlapping actions addressing the same or similar claims in a variety of different forums.[6]

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[6] Cases may be transferred "for the convenience of parties and witnesses" and "in the interest of justice" under 28 U.S.C. § 1404(a), and multiple cases "involving one or more common questions of fact" may be transferred to a single district for pretrial proceedings under 28 U.S.C. § 1407(a). Nonetheless, the transfer itself involves further costs; the cases remain separate

Of course, it is true that institutional investors in any securities case could always choose to file their own actions rather than remain members of a class, and there is therefore always some risk of duplicative litigation. Indeed, members of Rule 23(b)(3) classes have a right to opt out and, if they wish, pursue litigation on their own rather than as members of the class. *See* Fed. R. Civ. P. 23(c)(2)(B)(v). But eliminating the *American Pipe* rule for securities class actions effectively eliminates the opt-out right that class members may exercise after class certification in the large number of cases in which class certification occurs after the limitations period has run, including in connection with proposed class settlements. No one would exercise an opt-out right if the alternative were to try to litigate an untimely claim on one's own.

This Court should avoid the serious constitutional question that would be presented by effectively eliminating the opt-out right by not applying *American Pipe* to the limitations periods at issue. The opt-out right is required to preserve each class member's due process right to file an individual claim for damages.

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even after the transfer; and under Section 1407(a), the cases must ultimately be transferred back to their original districts after pretrial proceedings are completed. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). Finally, transfer motions may be denied, leading to a multiplicity of actions in different courts. *See, e.g., In re Petrobras Sec. Litig.*, No. MDL 2728, 2016 WL 4153597 (J.P.M.L. Aug. 5, 2016) (denying transfer from Pennsylvania to New York, where related class action is pending); *Vanguard Specialized Funds v. VEREIT Inc.*, No. CV-15-02157-PHX-ROS, 2016 WL 5858735, at *9 (D. Ariz. Oct. 3, 2016) (denying transfer from Arizona to New York, where related class action is pending).

See Wal-Mart, 564 U.S. at 363; *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Without class-action tolling, however, the right is meaningless, because only *American Pipe* tolling ensures that "the right to opt out and press a separate claim remain[s] meaningful." *Crown, Cork & Seal*, 462 U.S. at 351-52; *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174 (1974) ("[P]rocess which is a mere gesture is not due process."). As the Tenth Circuit put it, if *American Pipe* tolling were not applied to the limitations periods at issue, "the notice and opt-out provision of Rule 23(c)(2) would be irrelevant without tolling because the limitations period for absent class members would most likely expire, 'making the right to pursue individual claims meaningless.'" *Joseph v. Wiles*, 223 F.3d 1155, 1167 (10th Cir. 2000) (quoting *Realmonte v. Reeves*, 169 F.3d 1280, 1284 (10th Cir. 1999)). This Court should apply *American Pipe* here to avoid this constitutional question.

Instead of the post-certification opt-out, there is an incentive in the absence of *American Pipe* tolling for institutional and other plaintiffs to file independent actions *before* class certification to protect their claims from the possibility that the class will ultimately not be certified (or be decertified) and the limitations period will have expired. And the decision to file separate suits is likely a less informed one, simply because it takes place earlier in the litigation, when less is known about the case. If the class were ultimately certified (or even if the case were ultimately dismissed before certification on grounds that would preclude individual actions), all of this litigation would turn out to be unnecessary.

4. *Waste of Judicial and Party Resources.* The net result is that removing *American Pipe* protection encourages costly, duplicative litigation, which, if class certification is ultimately granted, would be simply a waste of resources. This Court explained in *American Pipe* that a class action is "a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." 414 U.S. at 550. Yet removing the protections of *American Pipe* in this important class of cases has had precisely the opposite effect in the circuits that have done so. It "frustrate[s] the principal function of a class suit" by encouraging "precisely the multiplicity of activity which Rule 23 was designed to avoid." *Id.* at 551. The "efficiency and economy of litigation," which this Court has termed "[t]he principal purposes of the class action procedure," are frustrated. *Crown, Cork & Seal*, 462 U.S. at 349.

Congressional policy strongly favors federal securities class actions to protect investors' rights and promote complete and accurate disclosure by issuers of publicly traded securities, and this Court has acknowledged that policy's importance. In the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 737 (1995), Congress adopted a variety of procedural and substantive reforms, including "heightened pleading requirements," "limit[s on] recoverable damages and attorney's fees," "a 'safe harbor' for forward-looking statements," "new restrictions on the selection of (and compensation awarded to) lead plaintiffs," "imposition of sanctions for frivolous litigation," and "a stay of discovery pending resolution of any motion to dismiss." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184,

1200 (2013) (citation omitted). In the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (1998), Congress acted to ensure that securities class actions would be litigated in federal rather than state court, reflecting "the congressional preference for national standards for securities class action lawsuits involving nationally traded securities." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 87 (2006) (citation and internal quotation marks omitted).

Although Congress in these reforms acted to address perceived abuses, it did not adopt proposals that were before it and that would have eliminated or otherwise significantly disfavored securities class actions. To the contrary, some of the new provisions, including the one giving preference to institutional investors as lead plaintiffs, *see* 15 U.S.C. §§ 77z-1(a)(3)(B)(iii)(I), 78u-4(a)(3)(B)(iii)(I), were premised on the need "to improv[e] the quality of representation in securities class actions" and thereby improve these actions' ability to serve their historic functions of compensating victims of securities-law violations and deterring future violations. H.R. Conf. Rep. No. 104-369, at *34 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 733 (1995). Thus, "[n]othing in the PSLRA . . . casts doubt on the conclusion 'that private securities litigation [i]s an indispensable tool with which defrauded investors can recover their losses'—a matter crucial to the integrity of domestic capital markets." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 320 n.4 (2007) (quoting *Merrill Lynch*, 547 U.S. at 81)). Indeed, "the effectiveness of the securities laws" depends "in large measure on the application of the class action device." *Yang v. Odom*, 392 F.3d 97, 109 (3d

Cir. 2004) (quoting *Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir. 1985)).

Adding wasteful and unnecessary costs to be borne by the parties and the judicial system seriously undermines securities class actions' efficacy in achieving these important objectives. Removing the protection of *American Pipe* has had that effect in the circuits that have done so—and in other circuits where *American Pipe* protection is uncertain—and should be rejected by this Court.

D. The Rationales for the *American Pipe* Rule Apply Equally Here

All of the grounds for the *American Pipe* rule in other limitations contexts apply equally to the three-year time limit in Section 13 (and the five-year limit applicable to Exchange Act cases). As the Court has explained, eliminating the *American Pipe* rule in this context, as in other contexts, "would frustrate the principal function of a class suit." 414 U.S. at 551. Without *American Pipe*, "[p]otential class members would be induced to file protective motions to intervene," *id.* at 553, and a putative class member "would have every incentive to file a separate action prior to the expiration of his own period of limitations." *Crown, Cork & Seal*, 462 U.S. at 350-51. "The principal purposes of the class action procedure—promotion of efficiency and economy of litigation—would thereby be frustrated." *Id.* at 349.

Those conclusions are as true of the three-year period in Section 13 as they are of the one-year period in Section 13, the Clayton Act limitations period in *American Pipe*, and the Title VII limitations period in

Crown, Cork & Seal. Given the class-action mechanism, there is no reason for a sound procedural system to throw away its benefits by essentially imposing higher costs on putative class members and ultimately requiring them to engage in wasteful and duplicative litigation in order to avoid the limitations bar while class certification is pending.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

MAX W. BERGER
Counsel of Record
SALVATORE J. GRAZIANO
BERNSTEIN LITOWITZ
BERGER & GROSSMANN
LLP
1251 AVENUE OF THE
AMERICAS, 44TH FLOOR
NEW YORK, NY 10020
(212) 554-1400
MAX@BLBGLAW.COM

BLAIR NICHOLAS
BERNSTEIN LITOWITZ
BERGER & GROSSMANN LLP
12481 HIGH BLUFF DRIVE
SAN DIEGO, CA 92130
(858) 793-0070

ROBERT D. KLAUSNER
KLAUSNER, KAUFMAN,
JENSEN & LEVINSON
7080 NW 4TH STREET
PLANTATION, FL 33317
(954) 916-1202

MARCH 6, 2017

APPENDIX

APPENDIX

List of Amici Curiae

Aegon Asset Management is a global asset manager. As of the end of 2016, Aegon Asset Management had EUR 331 billion ($350.8 billion USD) in assets under management.

AP7 is the Swedish state-owned default alternative to private investment funds in the Swedish public premium pension program. As of March 1, 2017, AP7 manages SEK 342.2 billion ($37.6 billion USD) of which SEK 314.7 billion ($34.6 billion USD) is invested in global equity and private equity investments.

APG Asset Management NV manages pension assets for approximately 4.5 million beneficiaries on behalf of its pension fund clients. APG manages pension assets for 20% of all families in the Netherlands. The firm invests in the public equity, fixed income, and alternative investments markets across the globe with approximately EUR 443 billion ($468 billion USD) in assets under management.

Arkansas Public Employees Retirement System provides retirement income to state, county and some municipal employees, college and university employees, non-teaching public school employees, and other non-state employees in the State of Arkansas.

Arkansas Teacher Retirement System provides retirement, disability, survivor and death benefits to public school teachers and other educationally related employees in the State of Arkansas.

ATP is a Danish mandatory savings scheme with more than five million members. As of the end of 2016, ATP had DKK 759 billion ($108.2 billion USD) in assets under management.

Automotive Industries Pension Trust Fund provides retirement benefits to individuals working as machinists or in related crafts involved in the maintenance and repair of consumer vehicles, commercial transport and industrial transport primarily in the Northern California area.

Baillie Gifford Overseas Limited provides investment management and advisory services to a range of global clients and is wholly owned by Baillie Gifford & Co. As of December 31, 2016, the Group had $180 billion USD in assets under management and advice.

Blue Sky Group is an independent pension administrator with 102,000 participants and EUR 19 billion ($20.1 billion USD) in assets under management.

California State Teachers' Retirement System provides retirement, disability and survivor benefits for full-time and part-time public school educators and their families in the State of California. It is the largest teachers' retirement system and second largest public pension fund in the United States.

Cambridge Retirement System provides retirement, disability, and other benefits to employees of the City of Cambridge, Cambridge Housing Authority, Cambridge Public Health Commission and Cambridge Redevelopment Authority in the Commonwealth of Massachusetts.

City of Atlanta Firefighters' Pension Fund provides retirement, death, and disability benefits to firefighters and their beneficiaries in the City of Atlanta, Georgia.

City of Dania Beach Police & Firefighters' Retirement System provides retirement, death and disability benefits for police officers, firefighters, and their beneficiaries. Pension plan participants were formerly employed by the City of Dania Beach, Florida and are now employed by the Broward County (Florida) Sherriff's Office pursuant to an interlocal agreement for services.

City of Fort Lauderdale Police and Fire Retirement System is a single employer, defined benefit retirement system covering more than 1,800 active and retired police officers and firefighters of the City of Ft. Lauderdale, Florida.

City of Hollywood Police Officers' Retirement System is a single employer, defined benefit retirement System covering more than 600 active and retired police officers of the City of Hollywood, Florida.

City of Miami Firefighters and Police Officers Retirement System is a single employer, defined benefit retirement system covering more than 4,100 active and retired police officers and firefighters of the City of Miami, Florida.

City of Miami Police Relief and Pension Fund is a single employer, defined contribution retirement plan covering sworn police officers of the City of Miami. The Fund has approximately 1,500 active participants.

City of Palm Bay Police and Fire Retirement System is a single employer defined benefit retirement system covering 436 active and retired police officers and firefighters in the City of Palm Bay, Florida.

City of Philadelphia, Board of Pensions and Retirement: The City of Philadelphia is a municipal corporation organized under the laws of the Commonwealth of Pennsylvania and the Philadelphia Home Rule Charter, and is a political subdivision of the Commonwealth of Pennsylvania. The Board of Pensions and Retirement is an independent board of the City of Philadelphia under the Philadelphia Home Rule Charter. The Board of Pensions and Retirement is charged with the maintenance of the retirement system for all City employees, and provides benefits to police, fire and civilian workers of the City of Philadelphia through the administration of 18 separate plans adopted from 1915 to the present. The City of Philadelphia Public Employees Retirement System, which is maintained by the Board of Pensions and Retirement, is funded by the City of Philadelphia and employees of the City.

Colorado Public Employees' Retirement Association provides retirement and other benefits to the employees of government agencies and public entities in the State of Colorado.

Denver Employees Retirement Plan provides retirement benefits to members of the City and County of Denver, Colorado, the Denver Employees Retirement Plan and the Denver Health and Hospital Authority.

The Employees Retirement System of the City of St. Louis provides retirement benefits for various public employees providing services to the inhabitants of the City of St. Louis.

The Employees' Retirement System of the State of Hawaii provides retirement, disability, and survivor benefits for State employees, teachers, professors, county employees, police officers, firefighters, judges, and elected officials.

Erie County Employees Retirement System is administered by the Erie County Retirement Board and provides retirement benefits to the employees of Erie County, Pennsylvania.

Fire & Police Pension Association of Colorado administers a statewide multiple employer public employee retirement system providing defined benefit plan coverage as well as death and disability coverage for police officers and firefighters throughout the State of Colorado.

Firefighters Retirement System of Louisiana is a multi-employer statewide defined benefit retirement system covering firefighters in 124 municipalities, parishes, and fire districts in the State of Louisiana.

Första AP-fonden is one of five buffer funds in the Swedish national income pension system. Första AP-fonden has assets under management of SEK 290.2 billion ($32 billion USD) (as of February 19, 2016) in a global portfolio.

Fresno County Employees' Retirement Association is a multiple employer public retirement system that provides retirement benefits for eligible employees, and their beneficiaries, of the County of Fresno,

Fresno County Superior Court, Fresno-Madera Area Agency on Aging, Clovis Veterans Memorial District, and Fresno Mosquito and Vector Control District.

Government Employees' Retirement System of the Virgin Islands administers retirement benefits for government employees, elected officials and retirees of the Virgin Islands.

Government of Guam Retirement Fund provides retirement, health, disability, and other benefits to employees and their beneficiaries of the Government of Guam.

Houston Firefighters' Relief and Retirement Fund provides retirement, disability and survivor benefits for firefighters of the City of Houston, Texas.

Illinois Municipal Retirement Fund provides retirement, disability, and death benefits to employees of local governments and school districts in the State of Illinois.

Industriens Pension administrates the labor market pension scheme for the employees under the Collective Bargaining Agreement for Industrial Employees. The labor market pension scheme is a compulsory scheme. Industriens Pension currently has around 400,000 members in approximately 8,000 companies with approximately DKK 180 billion ($21.3 billion USD) in assets under management.

Lord Abbett is an independent, privately held investment manager headquartered in Jersey City, New Jersey. The firm manages approximately $140 billion and offers a variety of fixed-income and equity strategies to individual and institutional investors.

The Los Angeles County Employees Retirement Association (LACERA) is a California public pension fund, which administers retirement, disability, and death benefits to more than 165,000 employees and retirees, and their beneficiaries of Los Angeles County and outside districts.

The Louisiana Sheriffs' Pension and Relief Fund (LSPRF) is a multi-employer, defined benefit retirement plan providing disability, death and retirement benefits to more than 20,000 sheriffs, deputy sheriffs, and tax collectors in the state of Louisiana. LSPRF is an institutional investor with more than $2.5 billion in assets and has been an active litigant in securities matters for the recovery of monies lost due to violation of federal securities laws. The LSPRF is directly interested in the maintenance of the reasonable standard established in *American Pipe*.

Maryland State Retirement and Pension System administers retirement, death, and disability benefits for employees, teachers, police, judges, law enforcement officers, correctional officers and legislators of the State of Maryland, as well as employees and law enforcement personnel of participating local governments in Maryland.

Montana Board of Investments is responsible for investing all state agency funds and local government funds under a unified investment program for the State of Montana.

MP Investment Management A/S manages assets for the Pension Fund for Danish MA's, MSc's and PhD's, and is fully owned by the pension fund. There

are approximately 120,000 members and assets under management total approximately $15 billion USD.

The National Conference on Public Employee Retirement Systems ("NCPERS") is the largest national, non-profit public pension trade association, with a membership that includes over 500 pension funds representing in excess of $2 trillion in assets. Since 1941, NCPERS has worked to protect the pensions of public employees.

The New York City Employees' Retirement System ("NYCERS"), the New York City Police Pension Fund ("PPF"), the New York City Fire Department Pension Fund ("FDPF"), the Board of Education Retirement System of the City of New York ("BERS"), and the Teachers' Retirement System of the City of New York ("TRS") are pension systems that provide retirement, disability, and death benefits to active and retired New York City employees. Collectively, the five New York City pension systems constitute the largest municipal pension fund in the United States, with more than $170 billion in assets under management.

The New York State Common Retirement Fund ("NYSCRF") holds and invests the assets of the New York State and Local Retirement System ("NYSLRS") which provides service and disability retirement benefits, as well as death benefits to state and local government employees and employees of certain other participating employers in the State of New York. As one of the largest public pension funds in the United States, NYSCRF invests on behalf of NYSLRS' more than one million members, beneficiaries, and retirees.

New York State Teachers' Retirement System ("NYSTRS") administers a defined benefit plan that provides retirement, disability and death benefits to New York State public school teachers and administrators (outside of New York City). It is the second largest public retirement system in New York State and one of the ten largest public pension funds in the nation.

NN Investment Partners is the asset manager of NN Group NV, a publicly traded corporation. As of September 31, 2016, their assets under management totaled up to EUR 199 billion ($210.4 billion USD).

The Office of the Treasurer as Trustee for the State of Connecticut Retirement Plans and Trust Funds ("Plans and Trust Funds"), each of which provide public pension funds for active, inactive, and retired state employees in Connecticut, and other governmental functions.

Operating Engineers Pension Trust provides retirement benefits to construction workers and their survivors, including heavy equipment operators, mechanics, concrete pumpers, soil testers, inspectors, and surveyors.

Pennsylvania Public School Employees' Retirement System is a defined benefit plan serving over 482,000 active and retired public school employees of the Commonwealth of Pennsylvania.

The Pennsylvania State Employees' Retirement System manages the pension benefits of more than 230,000 employees and retirees for 104 public sector employers in the Commonwealth of Pennsylvania.

The System is one of the nation's oldest and largest statewide retirement plans for public employees.

The Pension Reserves Investment Management ("PRIM") Board of the Commonwealth of Massachusetts is the trustee of the Massachusetts Pension Reserves Investment Trust ("PRIT") Fund, a defined benefit public pension fund with approximately 285,000 beneficiaries. PRIM works diligently on behalf of current and retired Massachusetts state employees and teachers, and also approximately 100 local municipal and county retirement systems throughout the Commonwealth of Massachusetts, to invest their pension assets in a manner that maximizes returns while mitigating risk.

PFA Pension forsikringsaktieselskab is a Danish pension fund with 1.1 million pension clients and over DKK 500 billion ($71.1 billion USD) in assets under management.

PGGM Investments manages pension assets for approximately 2.5 million beneficiaries in the Netherlands on behalf of its pension fund clients. As of the end of 2016, PGGM had EUR 200 billion ($210.1 billion USD) in assets under management.

The Public Employee Retirement System of Idaho provides retirement, disability, survivor, and other benefits to public employees working for more than 775 employers across the State of Idaho.

The Regents of the University of California ("the University") manages a portfolio of investments which provides benefits to current and retired employees and their beneficiaries. In addition, the Uni-

versity has a separate investment portfolio, its General Endowment Pool (est. 1933), which consists of over 5,000 individual endowed gift funds which support the University's mission of education, research and public service.

Robeco Institutional Asset Management B.V. ("Robeco") is an independently operated asset management company, indirectly wholly owned by Orix Corporation, a publicly traded corporation based in Tokyo, Japan. As of December 31, 2016, Robeco had EUR 139 billion ($147 billion USD) in assets under management.

Rockledge Firefighters', Rockledge General Employees' & Rockledge Police Officers' Retirement Plans manage the retirement plans for fire department, police department, and general employees of the City of Rockledge, Florida.

Sacramento County Employees' Retirement System provides retirement, disability, and survivors' benefits to employees of the County of Sacramento, California, the Superior Court of the County of Sacramento, and eleven special districts within the County of Sacramento.

San Mateo County Employees' Retirement Association is responsible for providing retirement, disability and survivor benefits to officers and employees of the County of San Mateo, the Superior Court of the County of San Mateo, and the San Mateo County Mosquito and Vector Control District in California.

Santa Barbara County Employees' Retirement System is responsible for providing retirement, disability, death and survivor benefits for employees of

the County of Santa Barbara and contracting districts.

SEB Investment Management is one of the largest commercial asset managers in Scandinavia. As of December 31, 2016, SEB Investment Management had EUR 95 billion ($100.7 billion USD) in assets under management.

Skandia Mutual Life Insurance Company is a mutual insurance company incorporated in Sweden, and the parent company of the Skandia group. The Skandia group is one of the largest independent providers of products for long-term savings and investments in Sweden, with approximately 2,700 employees and 2 million customers. As of the end of 2016, the Skandia group had assets under management of about SEK 607,000 million ($67.2 billion USD).

Sonoma County Employees' Retirement Association provides retirement, disability, death, and survivor benefits to the employees of the County of Sonoma, California.

The South Carolina Retirement System Investment Commission (RSIC) is responsible for investing and managing all assets of five governmental defined benefit plans, including the South Carolina Retirement System (collectively the "Systems"). RSIC is a seven-member commission, including the State Treasurer, the Director of the Public Employee Benefit Authority (PEBA), and a retired member of the Systems.

State Board of Administration of Florida is responsible for investing the assets of the Florida Retire-

ment System Trust Fund, one of the largest public retirement plans in the United States, as well as the assets of a variety of other state funds.

State of Wisconsin Investment Board is responsible for managing the assets of the Wisconsin Retirement System, the State Investment Fund (SIF) and other trust funds of the State of Wisconsin.

Storebrand is a financial services company listed on the Oslo stock exchange. Storebrand's main activities are related to life insurance and pension savings. By the end of 2016, Storebrand had NOK 577 billion ($68 billion USD) in assets under management.

Universities Superannuation Scheme was established in 1975 as the pension scheme for universities and other higher education institutions in the United Kingdom. It has around 375,000 scheme members across nearly 400 institutions and is one of the largest pension schemes in the UK, with total fund assets of approximately £56 billion (as of September 30, 2016).

Utah Retirement Systems provide retirement and insurance benefits to Utah public employees.

Virginia Retirement System administers pension plans and other benefits for public sector employees of the Commonwealth of Virginia.

Washington State Investment Board is responsible for managing investments for retirement plans for public employees, teachers, school employees, law enforcement officers, firefighters and judges in Washington State, as well as investments for other public funds that support or benefit industrial insurance, colleges and universities, and developmental disability programs in Washington State.

AND BRIEFS

No. 16-373

Supreme Court, U.S.
FILED
MAR - 6 2016
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM,
Petitioner,

v.

ANZ SECURITIES, INC. *ET AL.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC., *AS AMICI CURIAE* IN SUPPORT OF PETITIONER

Daniel S. Sommers
Counsel of Record
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Avenue, NW
Suite 500
Washington, DC 20005
(202) 408-4600
dsommers@cohenmilstein.com

Laura H. Posner*
Michael Eisenkraft
COHEN MILSTEIN SELLERS & TOLL PLLC
88 Pine Street, 14th Floor
New York, New York 10005

A. Valerie Mirko
Zachary T. Knepper
Christopher Staley
Mark J. Stewart
NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.
750 First Street, N.E.
Suite 1140
Washington, DC 20002

* *Bureau Chief, New Jersey Bureau of Securities, 2014 - 2017*

Dated: March 6, 2017

THE LEX GROUP DC ♦ 1825 K Street, N.W. ♦ Suite 103 ♦ Washington, D.C. 20006
(202) 955-0001 ♦ (800) 856-4419 ♦ Fax: (202) 955-0022 ♦ www.thelexgroup.com

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. PRIVATE SECURITIES CLASS ACTION LITIGATION SERVES A CRUCIAL ROLE IN ENFORCING THE SECURITIES LAWS, MAINTAINING INVESTOR CONFIDENCE, AND COMPENSATING VICTIMS OF FRAUD 5

A. Private Securities Class Action Litigation Provides Critical Investor Remedies and Promotes Confidence in the Markets 5

B. Congress and the Courts Have Routinely Recognized the Importance of Private Securities Class Action Litigation 8

II. REJECTION OF THE *AMERICAN PIPE* RULE BURDENS INVESTORS' ACCESS TO JUSTICE 10

A. The Class Action Device is Essential to Providing Justice to Investors.....10

B. Rejection of the *American Pipe* Rule Results in Wasteful, Duplicative and Unnecessary Litigation.....12

C. Rejection of the *American Pipe* Rule Leaves Small, Retail Investors Without Recourse.....15

D. Rejection of the *American Pipe* Rule Renders The Essential Protections of Federal Rules of Civil Procedure 23(c)(2) and (b)(3) and the Notice Provisions of the Class Action Fairness Act of 2005 Meaningless.....16

CONCLUSION.....21

TABLE OF AUTHORITIES

Page(s)

CASES

Am. Pipe & Constr. Co. v. State of Utah,
414 U.S. 538 (1974) ..... *passim*

Amchem Prods. v. Windsor,
521 U.S. 591 (1997) 11

Bateman Eichler, Hill Richards, Inc. v. Berner,
472 U.S. 299 (1985) 5, 9

Blue Chip Stamps v. Manor Drug Stores,
421 U.S. 723 (1975) 5

Chadbourne & Parke LLP v. Troice,
134 S. Ct. 1058 (2014) 8

Crown, Cork & Seal Co. v. Parker,
462 U.S. 345 (1983) 16

Elmore v. Henderson,
227 F.3d 1009 (7th Cir. 2000) 13

Halliburton Co. v. Erica P. John Fund,
134 S. Ct. 2398 (2014) 10

J.I. Case Co. v. Borak,
377 U.S. 426 (1964) 5

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No. 15 Civ.1879, 2016 WL 3648259
(2d Cir. July 8, 2016) 4

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(S.D.N.Y. Apr. 24, 2012) 3

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No. 13 Civ. 640, 2013 WL 8114524
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169 F.3d 1280 (10th Cir. 1999) 16

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540 F.3d 1223 (10th Cir. 2008) 3, 13

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229 F.3d 1345 (Fed. Cir. 2000)..... 3

Stoneridge Inv. Partners v. Scientific-Atlanta, Inc.,
552 U.S. 148 (2008) 9

Tellabs, Inc. v. Makor Issues & Rights, Ltd.,
551 U.S. 308 (2007) 5, 9

In re WorldCom Sec. Litig.,
496 F.3d 245 (2d Cir. 2007)..... 3, 13

STATUTES

28 U.S.C. § 1658(b)(2) 14

28 U.S.C.A. § 1715(a)(2)..... 18

28 U.S.C.A. § 1715(b) 18

28 U.S.C.A. §§ 1715(b)(1)-(8) 19

28 U.S.C.A. § 1715(d) 19

28 U.S.C.A. § 1715(e)(1)..... 19

29 U.S.C. § 1104(a)(1)(A)(i)..... 14

29 U.S.C. § 1104(a)(1)(B) 14

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Class Action Fairness Act of 2005, Pub. L. No. 109-2 § 2(a)(3)(C), 119 Stat. 4 (2005) 18

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U.S. Securities and Exchange Commission, *Fiscal Year 2017 Congressional Budget Justification Report*, https://www.sec.gov/about/reports/secfy17congbudgjust.pdf 7

STATEMENT OF INTEREST[1]

The North American Securities Administrators Association, Inc. ("NASAA") is the non-profit association of state, provincial, and territorial securities regulators in the United States, Canada and Mexico. NASAA has 67 members, including the securities regulators in all 50 states,[2] the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. Formed in 1919, NASAA is the oldest international organization devoted to protecting investors from fraud and abuse in the offer and sale of securities.

NASAA's U.S. members are responsible for regulating transactions under state securities laws, commonly known as "Blue Sky Laws."[3] NASAA U.S. members' principal activities include: registering local securities offerings, licensing the brokers and investment advisers who sell securities or provide investment advice, and initiating enforcement actions to address fraud and other misconduct.

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[1] Pursuant to U.S. Sup. Ct. Rule 37.6, counsel for *amicus* affirms that no party other than *amicus* and its counsel authored this brief, in whole or in any part, and that no person or entity other than *amicus* or *amicus's* counsel has made a monetary contribution to the preparation and submission of this brief. The parties' letters consenting to the filing of this brief have been lodged with the Clerk of the Court.

[2] Laura Posner, partner at Cohen Milstein Sellers & Toll PLLC and a co-author of this brief, served as the Bureau Chief of the New Jersey Bureau of Securities for approximately three years prior to January 2017.

[3] *See generally* 1 LOUIS LOSS ET AL., SECURITIES REGULATION 55-251 (5th ed. 2014).

NASAA's members are intimately familiar with the securities markets and the fraud and other abuses victimizing their state residents on a daily basis.

The overriding mission of NASAA and its members is to protect investors, particularly retail investors, from fraud and abuse. NASAA supports the work of its members and the investing public by, among other things, promulgating model rules, providing training opportunities, coordinating multi-state enforcement actions and examinations, and commenting on proposed legislation and rulemaking. NASAA also offers its legal analysis and policy perspective to state and federal courts as *amicus curiae* in important cases involving the interpretation of state and federal securities laws, securities regulation, and investor protection. This is one of those cases. NASAA and its members have an interest in this appeal because it will profoundly affect the ability of investors to obtain redress in cases where unscrupulous companies and individuals commit fraud. The resolution of this case will have a significant impact on the integrity of the securities markets and the remediation of securities fraud in those markets.

SUMMARY OF ARGUMENT

This Court's decision in *American Pipe* holds that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class

action."[4] Once a class action has been filed, the purposes of the limitations period have been fulfilled, as "the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation."[5]

Although *American Pipe* is colloquially described as equitable tolling, in fact, *American Pipe* "does not involve 'tolling' at all."[6] *American Pipe* interprets Rule 23 of the Federal Rules of Civil Procedure and defines what it means to "bring" an action under Rule 23 by treating absent class members as parties to the original action.[7]

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[4] *Am. Pipe & Constr. Co. v. State of Utah*, 414 U.S. 538, 554 (1974).

[5] *Id.* at 555.

[6] *State Farm Mut. Auto. Ins. Co. v. Boellstorff*, 540 F.3d 1223, 1232 (10th Cir. 2008) (quotations omitted). *See also In re Morgan Stanley Mortgage Pass-Through Certificates Litig.*, No. 09 Civ. 02137(LTS), slip op., at 3 (S.D.N.Y. Apr. 24, 2012) ("casual characterizations of American Pipe tolling as equitable are neither binding nor instructive.").

[7] *See In re WorldCom Sec. Litig.*, 496 F.3d 245, 255 (2d Cir. 2007) (under *American Pipe*, "members of the asserted class are treated for limitations purposes as having instituted their own actions . . . ."); *Boellstorff*, 540 F.3d at 1232-33 ("The class action mechanism's inherent representativeness means that each putative class member has effectively been a party to an action against the defendant since a class action covering him was filed." (internal quotations omitted)); *Stone Container Corp. v. United States*, 229 F.3d 1345, 1353-54 (Fed. Cir. 2000) (the principle that an action is "commenced" upon the filing of a complaint extends to all members of the asserted class); *In re Morgan Stanley Mortgage Pass-Through Certificates Litig.*, 810 F. Supp. 2d 650, 667 (S.D.N.Y. 2011).

The Second Circuit's decisions in *California Public Employees' Retirement System v. ANZ Securities, Inc., et al.* ("*ANZ*")[8] and *Police & Fire Retirement System of Detroit v. IndyMac MBS, Inc.* ("*IndyMac*")[9], vitiate the *American Pipe* rule. In holding that the filing of a class action no longer protects putative class member claims from the three-year repose period in Section 13 of the Securities Act of 1933 ("Securities Act"), the Second Circuit significantly undermined the efficacy of the class action device in securities litigation.

Securities fraud class action litigation initiated by private parties serves an essential means of protecting the integrity of the securities markets for investors, maintaining investor confidence in the markets, and compensating victims for losses suffered as the result of market participants engaging in violations of the securities laws.

ANZ and *IndyMac* impose significant burdens on institutional investors and the courts, and leave small, retail investors with reduced protections. Retail investors need class action lawsuits to protect themselves from fraud. For class actions to be robust, the interests of retail and institutional investors need to be aligned. Requiring investors to decide early-on whether to proceed with a class or opt-out and pursue an independent claim in order to

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[8] The Second Circuit's decision below was unpublished but is available as *In re Lehman Bros. Secs. & ERISA Litig.*, No. 15 Civ.1879, 2016 WL 3648259 (2d Cir. July 8, 2016).

[9] *Police & Fire Retirement System of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013).

avoid the running Section 13 of the Securities Act's statute of repose, undermines the continuing viability of class actions for all investors. Furthermore, the *ANZ and IndyMac* decisions undermine the ability of the courts to evaluate the superiority of class actions and state securities regulators to evaluate the reasonableness of potential class action settlements under the Class Action Fairness Act of 2005.

ARGUMENT

I. PRIVATE SECURITIES CLASS ACTION LITIGATION SERVES A CRUCIAL ROLE IN ENFORCING THE SECURITIES LAWS, MAINTAINING INVESTOR CONFIDENCE, AND COMPENSATING VICTIMS OF FRAUD.

A. Private Securities Class Action Litigation Provides Critical Investor Remedies and Promotes Confidence in the Markets.

Private securities fraud class actions "are 'a necessary supplement to [SEC] action.'"[10] Without such litigation, many instances of securities fraud would go unpunished because the volume of violations is too great for the U.S. Securities and

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[10] *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (quoting *J.I. Case Co.*, 377 U.S. 426, 432 (1964)); *accord Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007); *Randall v. Loftsgaarden*, 478 U.S. 647, 664 (1986); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975).

Exchange Commission ("SEC") and state securities regulators to detect and investigate all possible wrongdoing.[11] The SEC, charged by Congress with administering and enforcing federal securities laws, and state securities regulators, charged under Blue Sky laws with administering and enforcing state securities laws, do not have the budget or staffing necessary to enforce the securities laws on their own. According to former SEC Chair Mary Jo White, "additional funding [for the SEC] is imperative if we are to continue the agency's progress in fulfilling its responsibilities over our increasingly fast, complex, and growing markets."[12] But Congressional budget authorizations have not kept pace with the SEC's needs. For example, Congress appropriated approximately $1.6 billion for the agency's 2016 fiscal year, which was well short of the SEC's $1.72 billion request.[13] State securities regulators face similar budgetary constraints.[14]

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[11] Brief of the United States as *Amicus Curiae* Supporting Respondents at 1, *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633 (2010); *See also* S. Rep. No. 98, 104th Cong. 1st Sess. (1995), at 8 as printed in 1995 U.S.C.C.A.N. 679 ("[P]rivate rights of action are not only fundamental to the success of our securities markets, they are an essential complement to the SEC's own enforcement program.") (quoting SEC Chairman Arthur Levitt).

[12] Mary Jo White, SEC Chair, Testimony on the Fiscal Year 2017 Budget Request of the U.S. Securities and Exchange Commission (March 22, 2016), *available at* www.sec.gov/news/testimony/testimony-white-sec-fy-2017-budget-request.html.

[13] *See* U.S. Securities and Exchange Commission, Fiscal Year 2016 Agency Financial Report (Nov. 15. 2016), at p. 42, *available at* www.sec.gov/about/secafr2016.shtml; Mary Jo White, SEC Chair, Testimony on the Fiscal Year 2016 Budget Request of the U.S. Securities and Exchange Commission (May

Further, private securities fraud class action litigation is the primary mechanism for investor compensation. While the funds obtained by federal and state regulators may be substantial in some

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5, 2015), *available at* www.sec.gov/news/testimony/testimony-fy-2016-sec-budget-request.html. For 2017, the SEC requested an appropriation of $1.781 billion. *See* Securities and Exchange Commission Fiscal Year 2017 Congressional Budget Justification Report, p. 22, *available at* https://www.sec.gov/about/reports/secfy17congbudgjust.pdf; Mary Jo White, SEC Chair, Testimony on the Fiscal Year 2017 Budget Request of the U.S. Securities and Exchange Commission (April 12, 2016), *available at* https://www.sec.gov/news/testimony/testimony-white-budget-request-2017-senate.html. The House Appropriations Committee voted to appropriate to the SEC only $1.5 billion. *See* Senate Appropriations Committee, Financial Services and 17 General Government Appropriations Act, 2017 http://appropriations.house.gov/uploadedfiles/bills-114hr-sc-ap-fy2017-fservices-subcommitteedraft.pdf. The Senate Appropriations Committee has yet to vote on its financial services funding bill. For 2018, the SEC preliminarily requested an appropriation of $2.227 billion. *See* Mary Jo White, SEC Chair, Testimony on Examining the SEC's Agenda, Operations, and FY 2018 Budget Request (Nov. 15, 2016), *available at* https://www.sec.gov/news/testimony/white-testimony-sec-agenda-fy2018-budget-request.html.

[14] Notably, there is little overlap between private litigation and governmental enforcement actions. *See* Cornerstone Research, Securities Class Action Filings 2016 Year in Review, p. 18 (finding that from 2011 to 2015, approximately 10% - 25% of private class action settlements had corresponding SEC enforcement actions) *available at* www.cornerstone.com/Publications/Reports/Securities-Class-Action-Settlements-2015-Review-and-Analysis.

cases, the amounts collected pale in comparison to the amounts collected by private litigants.[15]

Private securities fraud class action litigation also serves a significant role in maintaining investor confidence by enforcing disclosure standards set forth in the securities laws.[16] As this Court has recognized, "[t]he magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated."[17] Investors "need confidence that they are being treated fairly and that the full range of risks are transparently disclosed."[18]

B. Congress and the Courts Have Routinely Recognized the Importance of Private Securities Class Action Litigation.

The class action device has been subject to significant limitations in recent years. For example,

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[15] John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and its Implementation*, 106 COLUM. L. REV. 1534, 1542-43 Tables 2 & 3 (2006). ("private enforcement . . . dwarf[s] public enforcement,")

[16] *See, e.g., Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 78 (2006).

[17] *Id. at* 78 (2006).

[18] Mary Jo White, SEC Chair, Keynote Address at the SEC-Rock Center on Corporate Governance Silicon Valley Initiative (Mar. 31, 2016), *available at* www.sec.gov/news/speech/chair-white-silicon-valley-initiative-3-31-16.html; *See also Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058, 1075 (2014)

the Private Securities Litigation Reform Act of 1995 significantly heightened plaintiffs' pleading standards [19] and the Securities Litigation Uniform Standards Act of 1998 severely cut back on the ability of plaintiffs to file claims in state court.[20]

Despite these limitations, this Court has "long recognized" that private securities fraud litigation is "an essential supplement" to government enforcement and regulation,[21] and that private litigation is "a prominent feature of federal securities regulation." Congress too recognizes the important role played by private securities class action litigation in deterring fraud and compensating victims: "[t]he SEC enforcement program and the availability of private rights of action together provide a means for defrauded investors to recover damages and a powerful deterrent against violations of the securities laws."[22] Congress also recognizes the important role such actions play in maintaining

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[19] *See* Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737.

[20] *See* Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227.

[21] *Tellabs, Inc.* 551 U.S. at 313 (2007); *Stoneridge Inv. Partners v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 165 (2008). *See also Bateman Eichler,* 472 U.S. at 310 (observing that "implied private actions provide a most effective weapon in the enforcement of the securities laws" (internal citations omitted)).

[22] S. Rep. No. 98, 104th Cong. 1st Sess., at 8 (1995). *See also Tellabs,* 551 U.S. at 321 n.4 ("Nothing in the PSLRA . . . casts doubt on the conclusion 'that private securities litigation is an indispensable tool with which defrauded investors can recover their losses – a matter crucial to the integrity of domestic capital markets.'" (quoting *Dabit,* 547 U.S. at 81).

investor confidence in our markets and ensuring market integrity:

> Private securities litigation is an indispensable tool with which defrauded investors can recover their losses without having to rely upon government action. Such private lawsuits promote public and global confidence in our capital markets and help to deter wrongdoing and to guarantee that corporate officers, auditors, directors, lawyers and others properly perform their jobs.[23]

To the extent there are concerns about the class action process or the uses of class action litigation, such concerns are "more appropriately addressed by Congress" than by the judiciary.[24]

II. REJECTION OF THE *AMERICAN PIPE* RULE BURDENS INVESTORS' ACCESS TO JUSTICE.

A. The Class Action Device is Essential to Providing Justice to Investors.

Investors, particularly retail investors, face a collective action problem when privately seeking compensation from the perpetrator of a securities fraud. While each investor harmed by securities fraud could benefit from litigation, few have the

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[23] H.R. Conf. Rep. No. 369, 104th Cong. 1st Sess. (1995), at 31 (Nov. 28, 1995).

[24] *Halliburton Co. v. Erica P. John Fund*, 134 S. Ct. 2398, 2413 (2014).

incentive to investigate and bring claims because the costs of litigation often dwarf their individual expected returns.[25] The class action device solves this problem by permitting groups of investors to share litigation costs. The class action device also provides an incentive to plaintiffs' attorneys, who must devote significant time, financial resources, and human capital, to prosecute cases of fraud.[26] Without this incentive, most defrauded investors would not be able to afford representation or to take action to recover losses.

Failure to "toll" the statute of repose under Section 13 of the Securities Act during the pendency of a securities class action endangers the continued viability of the class action device as a tool for investor protection. Retail investors rely on class counsel to advance their interests in court and, if appropriate, obtain the best possible settlement with a defendant. It is generally not economical or practical for retail investors to opt-out of a potential settlement and seek their own remedies. Retail investors, accordingly, need the class to be as robust as possible. In particular, retail investors need to pursue their interests alongside institutional investors in order to leverage institutional investors' generally greater financial interests in, and ability to exercise oversight over, a case. Requiring institutional investors to decide early in any

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[25] *See* Lisa L. Casey, *Class Action Criminality*, 34 IOWA J. CORP. L. 153, 163 (2008). *See also Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997) (*quoting Mace. v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997).

[26] Lisa L. Casey, *Class Action Criminality*, 34 IOWA J. CORP. L. at, 163.

litigation whether to proceed with a class or opt-out and pursue their own lawsuits would undermine the ability of the class to pursue common objectives and limit the viability of class actions for small, retail investors.

B. Rejection of the *American Pipe* Rule Results in Wasteful, Duplicative and Unnecessary Litigation.

Rejection of the *American Pipe* rule "would deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure," by causing potential class members "to file protective motions to intervene or to join in the event that a class was later found unsuitable."[27] Initially, those institutional investors who have the means to do so will be forced to closely monitor and evaluate all pre-certification class actions pending in multiple forums in which they have a significant financial interest. Such monitoring and evaluation would be costly and time consuming, particularly for large institutional investors with broad and diversified portfolios. It would also be generally impossible to accomplish accurately, given that significant relevant information about both the merits of the case and the likelihood of class certification is not available to class members as it is held exclusively by the parties to the litigation behind confidentiality agreements insisted upon by defendants, as well as subject to complex expert and legal analysis.

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[27] *See Am. Pipe & Constr. Co.*, 414 U.S. at 554.

In many cases, those institutional investors will then be forced to retain counsel to either intervene in the class case or file prophylactic individual actions in order to preserve their interests.[28] Such litigation significantly increases the complexity of the litigation, the costs and fees associated with the litigation, and the burden on the judicial system. Specifically, duplicative motions would be filed, discovery expanded and multiplied, and summary judgment would be briefed and trial conducted in multiple venues. These costs, fees and burdens would be borne not only by institutional investors, but by all parties to the litigation, all class members, and the judicial system itself.

Failure to either intervene or file an individual action could result in significant monetary losses for institutional investors and their beneficiaries, most typically police officers, public school teachers and administrators, firefighters, and other public employees and retirees, who could lose their right to recover for violations of the federal

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[28] *Id.* at 553-54 ("a rule requiring successful anticipation of the determination of the viability of the class would breed needless duplication of motions"); *see also WorldCom*, 496 F.3d at 256 (*American Pipe* tolling was created "to protect class members from being forced to file individual suits in order to preserve their claims"); *Boellstorff*, 540 F.3d at 1229 ("If not for a tolling doctrine, individuals would feel compelled to file placeholder lawsuits prior to the expiration of the statute of limitations, thereby clogging the channels of the court with suits already encompassed by the class action."); *Elmore v. Henderson*, 227 F.3d 1009, 1012 (7th Cir. 2000) (*American Pipe* tolling "would thus be seriously impaired by a rule that required all the class members to file separate, protective suits, . . . We want the class members to rely on the filing of the class action rather than to clutter the courts with a multitude of separate suits.").

securities laws if either the class is not certified or is certified after the applicable periods for asserting new claims has run.[29] As fiduciaries to their participants and beneficiaries, institutional investors have the statutory obligation to act "for the exclusive purpose of . . . providing benefits to participants and their beneficiaries"[30] and to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."[31] Given these and other obligations, it would be difficult for any institutional investor to justify not taking at least certain of these steps to protect the interests of their beneficiaries.

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[29] *See* Svetlana Starykh & Stefan Boettrich, *Recent Trends in Securities Class Action Litigation*: 2015 Full-Year Review (2016), *available at* www.nera.com/content/dam/nera/publications/2016/2015_Securities_Trends_Report_NERA.pdf (finding that ruling on class certification takes three years or longer in more than one-third of cases); Br. of Civil Procedure and Securities Law Professors as *Amici Curiae* in Supp. of Pet. for a Writ of Cert., *Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, No. 13 Civ. 640, 2013 WL 8114524, at *8-11 (S.D.N.Y. Dec. 26, 2013) (finding that 25% of all Rule 10b-5 class actions and 76% of the actions that reached a certification order did not reach class certification before the five-year limitations period under 28 U.S.C. § 1658(b)(2) expired, and that 50% of all cases brought under Sections 11 and 12 of the Securities Act and 83% of the cases that reached a certification order had expired before the three-year limitations period).

[30] 29 U.S.C. § 1104(a)(1)(A)(i),

[31] 29 U.S.C. § 1104(a)(1)(B).

C. Rejection of the *American Pipe* Rule Leaves Small, Retail Investors Without Recourse.

While rejection of the *American Pipe* rule will incentivize large, sophisticated investors to file duplicative litigation, small investors will have no recourse. These small, typically retail, investors have neither the means nor financial incentive to monitor or evaluate pre-certification securities class actions. Indeed, until they receive a notice notifying them that they are eligible to be part of a securities class, many of these investors do not even know they held stock in a company that defrauded them. As a result, they are beholden to the class representatives and their counsel.

NASAA's U.S. members and their federal counterparts can attempt, at great effort and expense, to help fill this void by bringing duplicative regulatory enforcement actions to protect these small investors' interests where possible. However, as discussed above, regulators face significant budgetary constraints and competing demands for resources which will prevent them from being able to fill an *American Pipe* sized hole in the securities enforcement structure. Further, while both state and federal securities regulators have the expertise to bring such cases, their efforts are seldom directed at making securities fraud victims whole and they are often not well-equipped to handle the costly and time consuming process of providing restitution to fraud victims when they do so. Given these realities, without *American Pipe* and class actions, small investors will often have no recourse at all.

D. Rejection of the *American Pipe* Rule Renders The Essential Protections of Federal Rules of Civil Procedure 23(c)(2) and (b)(3) and the Notice Provisions of the Class Action Fairness Act of 2005 Meaningless.

Federal Rules of Civil Procedure 23(c)(2) and (b)(3) and the Notice Provisions of the Class Action Fairness Act of 2005 provide critical oversight over class actions. Rule 23(c)(2) requires courts to provide class members with an opportunity to opt-out of the class and pursue individual actions. By providing a mechanism for investors to opt-out, Rule 23(c)(2) helps to ensure that settlements are fair and reasonable to all class members and that class counsel are acting appropriately and in the best interest of the class. Accordingly, the ability to opt-out is important to the viability of class actions as a potential investor remedy. However, Rule 23(c)(2) becomes useless if individual class members' claims are time-barred.[32] No one would exercise an opt-out right if the alternative is to try to litigate an untimely claim on one's own. Without a realistic opportunity to opt-out, class members – and, in particular, small retail investors – will lose the only real check they have on ensuring that lead plaintiffs and class counsel represent their interests vigorously. Relatedly, lead plaintiffs and their class counsel will lose their incentive to act in the best

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[32] *See Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 351-52 (1983) (opt-out rights are only "meaningful" if *American Pipe* tolling applies); *Realmonte v. Reeves*, 169 F.3d 1280, 1284 (10th Cir. 1999) ("We agree with the [Supreme Court] that without tolling, [Rule 23(c)(2)] would be irrelevant . . . .").

interests of the class and, in particular, the interests of unnamed class members, since failure to do so will not result in opt-outs.

Similarly, Rule 23(b)(3) commands courts to determine whether "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." It permits courts to not only assess the superiority of the class mechanism, but to appoint new lead plaintiffs or class representatives if appropriate and to create sub-classes to ensure the interests of all class members are protected. However, the Rule 23(b)(3) inquiry becomes meaningless if individual actions are time-barred. If the statute of repose has run, the class action will always be superior to individual actions, regardless of whether the interests of all class members are being protected or class counsel is acting in the best interest of the class. These concerns are particularly important in securities class actions, where class discovery is often delayed for years.[33] A toothless Rule 23(b)(3) inquiry again would disproportionately harm small investors who are unable to file individual actions to protect their own interests.

Rejection of the *American Pipe* rule also would neuter the notice provisions in the Class Action Fairness Act of 2005, Pub. L. No. 109-2 ("CAFA"). In passing CAFA, Congress was animated, at least in part, by concern that class members were unable "to

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[33] *See Morgan Stanley*, 810 F. Supp. 2d at 668 (recognizing that securities cases in particular require the benefits of *American Pipe* tolling).

fully understand and effectively exercise their rights."[34]

To ameliorate those concerns, Section 3 of CAFA creates a "consumer class action bill of rights" to protect plaintiffs from unfair settlements via regulatory oversight (the "Bill of Rights"). The Bill of Rights provides that, "not later than 10 days after a proposed settlement of a class action is filed in court," each defendant participating in a proposed settlement of a federal class action must "serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official a notice of the proposed settlement."[35] The "appropriate State official" is defined as "the person in the State who has the primary regulatory or supervisory responsibility with respect to the defendant, or who licenses or otherwise authorizes the defendant to conduct business in the State, if some or all of the matters alleged in the class action are subject to regulation by that person."[36] If no such official exists, or "if the matters alleged in the class action are not subject to regulation," then the State Attorney General is the "appropriate State official."[37] In securities class actions, a NASAA U.S. member, as the securities regulator of each state, is typically the "appropriate State official" under CAFA.

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[34] *Class Action Fairness Act of 2005*, Pub. L. No. 109-2 at § 2(a)(3)(C), 119 Stat. 4 (2005).

[35] 28 U.S.C.A. § 1715(b).

[36] *Id.* at § 1715(a)(2).

[37] *Id.*

The Bill of Rights specifies the content of the notice as including: (1) a copy of the complaint and related materials; (2) notice of any scheduled hearings in the class action; (3) any proposed or final notification to class members regarding opt-out and settlement; (4) any proposed or final settlement; (5) any settlement or agreement made between class counsel and defense counsel; (6) any final judgment or notice of dismissal; (7) if feasible, the names of class members who reside in each state and the proportion of settlement proceeds by state; and (8) any written judicial opinions related to the other notice content.[38] A district court may not approve any proposed settlement until ninety days after proof of service of the required notice,[39] and a class member may refuse to be bound by the terms of the settlement if noticed is omitted.[40]

The Bill of Rights and its notice provisions were designed to ensure that "a responsible state and/or federal official receives information about proposed class action settlements and is in a position to react if the settlement appears unfair to some or all class members or inconsistent with applicable regulatory policies."[41] Such state regulatory authorities are well situated to "voice concerns if they believe that the class action settlement is not in the best interest of their citizens."[42] The notice

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[38] *Id.* at § 1715(b)(1)-(8).

[39] *Id.* § 1715(d).

[40] *Id.* § 1715(e)(1).

[41] S. Rep. No. 14, 109th Cong. 1st Sess. (2005), reprinted in 2005 U.S.C.C.A.N. at 32.

[42] *Id.* at 5, 2005 U.S.C.C.A.N. at 6.

provisions are thus designed to provide "a check against inequitable settlements in these cases," which could arise from "collusion between class counsel and defendants to craft settlements that do not benefit the injured parties."[43]

If the filing of a class action complaint does not "toll" the three-year repose period in Section 13 of the Securities Act, CAFA's notice provisions would be functionally meaningless in the large number of securities class actions that settle after the statute of repose has expired. When an "appropriate State official" objects to a settlement, the settlement is often rejected in its entirety, causing class members to lose whatever recovery was contemplated by the settlement. Class members could not then subsequently obtain a better or more valuable settlement through individual actions, since their claims would be immediately dismissed as untimely. And, defendants would have no incentive to increase the value of the class settlement since there is no risk of facing individual actions. Accordingly,

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[43] *Id.* at 35, 2005 U.S.C.C.A.N. at 3, 34. *See also* 151 Cong. Rec. S450 (daily ed. Jan. 25, 2005) (statement of Sen. Kohl) ("The Attorney General review is an extra layer of security for the plaintiffs and is designed to ensure that abusive settlements are not approved without a critical review by one or more experts."); 147 Cong. Rec. 22740 (2001) (statement of Sen. Grassley) ("To address the problem where class members get nothing and attorneys get millions, the Class Action Fairness Act of 2001 provides that notification of any proposed settlements must be given to the State attorneys general or the primary regulatory or licensing agency of any State whose citizens are involved."); 143 Cong. Rec. 1292 (1997) (statement of Sen. Kohl) (exhorting officials to "intervene in cases where they think the settlements are unfair").

"appropriate State officials" will not object to any of the many settlements reached after the expiration of the statute of repose, since doing so would deprive investors of any recovery. This perverse result deprives class members and the courts of the oversight and input of state securities regulators over class action settlements as mandated by Congress in CAFA.

CONCLUSION

For all of the foregoing reasons, *amici curiae* respectfully submit that the Second Circuit's *ANZ* decision should be overturned.

Respectfully submitted,

Daniel Sommers
Counsel of Record
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Ave NW #500,
Washington, DC 20005
(202) 408-4600
dsommers@cohenmilstein.com

Laura H. Posner
Michael Eisenkraft
COHEN MILSTEIN SELLERS & TOLL PLLC
88 Pine Street, 14th Floor
New York, NY 10005

A. Valerie Mirko
Zachary T. Knepper
Christopher Staley
Mark J. Stewart
NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.
750 First Street, NE, Suite 1140
Washington, DC 20002

Dated: March 6, 2017

No. 16-373

IN THE

Supreme Court of the United States

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM,

Petitioner,

v.

ANZ SECURITIES, INC., *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICI CURIAE PUBLIC CITIZEN, INC., AND PUBLIC JUSTICE, P.C., IN SUPPORT OF PETITIONER

F. PAUL BLAND
PUBLIC JUSTICE, P.C.
1620 L Street NW
Suite 630
Washington, DC 20036
(202) 797-8600

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

Attorneys for Amici Curiae

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. Applying the *American Pipe* rule to claims subject to 15 U.S.C. § 77m would not modify substantive rights in violation of the Rules Enabling Act. 5

A. This Court should not distinguish limitations and "repose" periods for Rules Enabling Act purposes. 7

B. The *American Pipe* rule does not modify substantive rights. 11

II. Not applying *American Pipe* would make class members' right to recover dependent on class certification and substantially impair the due-process protection provided by the right to opt out of a class action seeking monetary relief. 14

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

Cases:

Amchem Prods., Inc. v. Windsor,
521 U.S. 591 (1997) 1, 16, 19, 20

Am. Pipe & Constr. Co. v. Utah,
414 U.S. 538 (1974) ..... *passim*

Amgen Inc. v. Conn. Ret. Plans & Trust Funds,
133 S. Ct. 1184 (2013) 1

In re Baby Prods. Antitrust Litig.,
708 F.3d 163 (3d. Cir. 2013) 18

Beach v. Ocwen Fed. Bank,
523 U.S. 410 (1998) 8, 9, 10

Brown v. Plata,
563 U.S. 493 (2011) 15

Campbell-Ewald Co. v. Gomez,
136 S. Ct. 663 (2016) 1

Crown, Cork & Seal Co. v. Parker,
462 U.S. 345 (1983) 3, 4, 5, 16, 17

CTS Corp. v. Waldburger,
134 S. Ct. 2175 (2014) 10, 11

Dart Cherokee Basin Operating Co. v. Owens,
135 S. Ct. 547 (2014) 1

Datskow v. Teledyne, Inc.,
899 F.2d 1298 (2d Cir. 1990) 13

In re Dry Max Pampers Litig.,
724 F.3d 713 (6th Cir. 2013) 18, 19

Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (1974) 16

In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.,
55 F.3d 768 (3d Cir. 1995) 18

Grispino v. New England Mut. Life Ins. Co.,
358 F.3d 16 (1st Cir. 2004) 17

Hanna v. Plumer,
380 U.S. 460 (1965) 13

Hecht v. United Collection Bur., Inc.,
691 F.3d 218 (2d Cir. 2012) 19

Jefferson v. Ingersoll Int'l Inc.,
195 F.3d 894 (7th Cir. 1999) 19

Joseph v. Wiles,
223 F.3d 1155 (10th Cir. 2000) 17

In re Katrina Canal Breaches Litig.,
628 F.3d 185 (5th Cir. 2010) 19

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,
501 U.S. 350 (1991) 9, 10, 11

Mathews v. Eldridge,
424 U.S. 319 (1976) 18

Miss. ex rel. Hood v. AU Optronics Corp.,
134 S. Ct. 736 (2014) 1

Miss. Pub. Corp. v. Murphree,
326 U.S. 438 (1946) 6

Molski v. Gleich,
318 F.3d 937 (9th Cir. 2003) 19

Morse v. Elmira Country Club,
752 F.2d 35 (2d Cir. 1984) 13

Ortiz v. Fibreboard Corp.,
527 U.S. 815 (1999) 16, 19

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) 16

Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc.,
721 F.3d 95 (2d Cir. 2013),
cert. granted sub nom. Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc.,
134 S. Ct. 1515, *cert. dismissed*,
135 S. Ct. 42 (2014) 2, 8

Realmonte v. Reeves,
169 F.3d 1280 (10th Cir. 1999) 16, 17

Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.,
559 U.S. 393 (2010) 1, 6, 11, 13, 14, 15

Smith v. Bayer Corp.,
564 U.S. 299 (2011) 1, 6, 16

Staton v. Boeing Co.,
327 F.3d 938 (9th Cir. 2003) 18

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,
559 U.S. 662 (2010) 15

Taylor v. Sturgell,
553 U.S. 880 (2008) 16

In re Telectronics Pacing Sys., Inc ,
221 F.3d 870 (6th Cir. 2000) 19

Tyson Foods, Inc. v. Bouaphakeo,
136 S. Ct. 1036 (2016) 1, 6, 7, 14

Walker v. Armco Steel Corp.,
446 U.S. 740 (1980) 12

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011) 7, 16, 20

West v. Conrail,
481 U.S. 35 (1987) 12, 13

Constitutional Provisions, Statutes, and Rules:

15 U.S.C. § 77k 9
15 U.S.C. § 77l(a)(1) 9
15 U.S.C. § 77l(a)(2) 9
15 U.S.C. § 77m 4, 5, 8, 9, 10, 17, 20
Rules Enabling Act, 28 U.S.C. § 2072 .....*passim*
Fed. R. Civ. P. 3 12
Fed. R. Civ. P. 23 .....*passim*
Rule 23(b)(1) 2
Rule 23(b)(2) 2
Rule 23(b)(3) 2, 16, 20
Rule 23(c)(2) 17
Rule 23(e)(4) 20

Other:

Fed. R. Civ. P. 23, Advisory Committee Notes.... 19, 20

INTEREST OF AMICI CURIAE[1]

Public Citizen, Inc., is a consumer advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public. The enforcement of such laws frequently involves class actions as well as individual lawsuits. Public Citizen has a longstanding interest in preserving the viability of these mechanisms for protecting the rights of consumers and the general public.

Accordingly, Public Citizen has participated as amicus curiae, and its attorneys have served as counsel to parties or amici curiae, in many cases in this Court and other federal courts involving class action procedures, including: *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016); *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016); *Smith v. Bayer Corp.*, 564 U.S. 299 (2011); *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393 (2010); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (2014); *Miss. ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014); and *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013). Public Citizen also filed a brief as amicus curiae when the issue presented by this case was previously before this

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amici curiae made a monetary contribution to its preparation or submission. Written consents to filing from both parties are on file with the Clerk.

Court in *Public Employees' Retirement System of Mississippi v. IndyMac MBS, Inc.*, No. 13-640.

Public Justice, P.C. is a national public interest law firm dedicated to pursuing justice for the victims of corporate and governmental abuses. It specializes in precedent-setting and socially significant cases designed to advance consumers' and victims' rights, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless. Public Justice regularly represents employees and consumers in class actions. In its experience, the class action device is often the only meaningful way that individuals can vindicate important legal rights.

While firm in their support for class actions, both Public Citizen and Public Justice are also deeply concerned with protection of both substantive and procedural rights of absent class members in class actions. Public Citizen and Public Justice attorneys have, in many cases, represented class members who objected to a class settlement or otherwise sought to assert their individual due process rights. Of particular concern to amici have been cases where class counsel and defendants agreed to settlements under Federal Rule of Civil Procedure 23(b)(1) or (b)(2) to resolve substantial damages claims while eliminating the opt-out rights of absent class members that are provided for in Rule 23(b)(3) and that, in some circumstances, are required by due process. Those concerns are directly affected by this case because the decision below and the arguments of respondents would significantly impair opt-out rights of absent class members.

INTRODUCTION AND SUMMARY OF ARGUMENT

Class actions are essential tools for remedying violations of rights that affect large numbers of people. The rules governing class actions—including procedural rules concerning what filings suffice to stop the running of statutes of limitations for class members—must advance the fair and efficient functioning of the class mechanism. At the same time, the interests of individuals in the ability to assert substantial legal claims for themselves should they choose to do so, and the due-process protection of those interests provided by Federal Rule of Civil Procedure 23's opt-out mechanism, are also of critical importance and require consideration in any construction of Rule 23.

All these concerns are implicated here. The holdings of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983)—establishing the principle that class action filings satisfy statutes of limitations for individual members of the putative class even if those individuals ultimately seek to litigate individually either because the class is not certified or because they are excluded from or opt out of the class—are critical both to the effective functioning of class actions and to the protection of the rights of individual class members. Those rights include class members' right to opt out of a class action and pursue their claims through individual actions if the conduct of the class action is not to their satisfaction. Adoption of the view taken by the Second Circuit below—that the *American Pipe* rule is inapplicable to "repose" limitations provisions in the federal securities laws—is not necessary to preserve substantive rights

of securities defendants or to fulfill the policy of the limitations statutes. It would, however, significantly impair the rights of class members.

The petitioners have demonstrated that application of the *American Pipe* tolling rule to the three-years-from-offering limitations or "repose" period in 15 U.S.C. § 77m is fully consistent with the requirements of the statute and is necessary for the same reasons that led the Court to adopt the rule in *American Pipe* and apply it in the subsequent decision in *Crown Cork*. We write not to repeat those arguments, but to elaborate on two important points.

First, although respondents assert that application of the *American Pipe* rule here would give a construction to Federal Rule of Civil Procedure 23 that would modify substantive rights in violation of the Rules Enabling Act, 28 U.S.C. § 2072, it is actually respondents' position that would make procedural determinations under Rule 23 determinative of class members' right to recover for the violations at issue. The application of *American Pipe* to section 77m is fully consistent with the Rules Enabling Act because section 77m establishes no substantive rights different from those of any other limitations statute, and because the *American Pipe* rule fully preserves the protections afforded by the statute. The *American Pipe* rule, like Rule 23 itself, regulates procedures and thus is fully consistent with the Rules Enabling Act.

Second, failing to apply *American Pipe* would mean that whether a particular class member had a claim that survived application of the limitations statute would depend on whether the class were certified and whether the class member remained in the class. That result is at odds with the fundamental no-

tion that the rights of class members are not supposed to vary depending on whether they are pursued within or outside of a class.

Moreover, depriving class members of the protections of *American Pipe* would render meaningless their right to opt out of the class—a right that serves to square class actions with the requirements of due process and that provides a critical check against abusive class settlements.

ARGUMENT

I. Applying the *American Pipe* rule to claims subject to 15 U.S.C. § 77m would not modify substantive rights in violation of the Rules Enabling Act.

The parties here do not contest that the timely filing of a class action asserting the securities claims at issue satisfied the applicable limitations periods for all members of the class who remained within the class and accepted the settlement. The Second Circuit, however, held that this Court's holdings in *American Pipe* and *Crown Cork* that the running of a limitations period is suspended for all class members during the pendency of a class action is inapplicable to claims subject to the so-called "repose" limitations periods set forth in the federal securities laws. Under the court of appeals' holding, members of a putative or certified class who seek to assert the same claims in an individual action cannot receive the benefit of a timely class-action filing if the class is not certified, or if they opt out of or are otherwise excluded from the scope of any class ultimately certified. Indeed, the court of appeals concluded that applying *American Pipe* here would violate the Rules Enabling Act by improperly modifying "substantive rights." 28 U.S.C.

§ 2072. Respondents echo that view here. *See* Br. in Opp. 24–25. The Rules Enabling Act argument, however, is deeply flawed.

"In the Rules Enabling Act, Congress authorized this Court to promulgate rules of procedure subject to its review, 28 U.S.C. § 2072(a), but with the limitation that those rules 'shall not abridge, enlarge or modify any substantive right,' § 2072(b)." *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 406–07(2010). This Court has long held that whether a duly promulgated rule of civil procedure is valid under the Act depends on whether it "really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941). As the plurality put it in *Shady Grove*, "What matters is what the rule itself regulates: If it governs only the 'manner and the means' by which the litigants' rights are 'enforced,' it is valid; if it alters 'the rules of decision by which [the] court will adjudicate [those] rights,' it is not." 559 U.S. at 406 (quoting *Miss. Pub. Corp. v. Murphree*, 326 U.S. 438, 446 (1946)).

The *American Pipe* rule is a judicial construction of Rule 23, and there is no doubt, and no dispute, that Rule 23 itself is valid under the Rules Enabling Act. Unquestionably, Rule 23 really regulates procedure. *See Shady Grove*, 559 U.S. at 408 (plurality); *id.* at 431–32 (concurrence); *id.* at 446–47 (dissent); *see also Smith v. Bayer Corp.*, 564 U.S. 299, 304 n.2 (2011) (citing *Shady Grove*); *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046–48 (2016).

This Court has indicated, however, that judicial interpretations of Rule 23, as well as the Rule itself, must conform to the limits of the Rules Enabling Act. Thus, the Court observed in *Wal-Mart Stores, Inc. v. Dukes* that "the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" 564 U.S. 338, 367 (2011). In *Tyson Foods*, the Court similarly noted that a judicial holding that would limit a plaintiff's substantive right to prove her case "merely because the claim is brought on behalf of a class" would "ignore the Rules Enabling Act's pellucid instruction that use of the class device cannot 'abridge ... any substantive right.'" 136 S. Ct. at 1046.

Application of the *American Pipe* rule to the three-years-from-violation limitations period at issue here would have no such improper effect, for two reasons. First, the limitations period is itself a regulation of the manner and means of enforcing substantive rights, not a substantive right itself within the meaning of the Rules Enabling Act. Second, even if the limitations period established a substantive right, applying *American Pipe*'s construction of Rule 23 to it would not limit, abridge, or modify it. Rather, *American Pipe*'s application would only regulate the manner and means of enforcing the limitations period by determining what forms of filing are sufficient to bring a claim within the required period. As *American Pipe* itself held, construing Rule 23 in that manner really regulates procedure, not substance.

A. This Court should not distinguish limitations and "repose" periods for Rules Enabling Act purposes.

The Second Circuit's Rules Enabling Act holding rests on the false premise that the three-year limitations period set forth in 15 U.S.C. § 77m establishes a substantive limit on the underlying rights at issue by extinguishing them rather than merely denying a remedy for their violation. The reasoning underlying that view of the statute, as stated by the court below in its earlier precedential ruling adopted by the panel in this case, goes as follows: The three-year limitations period in section 77m is a "statute of repose" because it is triggered by the defendant's conduct rather than the accrual of the plaintiff's right of action; a statute of repose, by definition, extinguishes the underlying right rather than limiting the remedy; therefore, section 77m must extinguish a plaintiff's substantive rights once three years have passed. *See Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 106–07 (2d Cir. 2013).

That reasoning is incompatible with this Court's decisions, which teach that whether a statute limits rights or remedies is not dependent on the application of extra-statutory labels such as "statute of repose" but on the actual language enacted by Congress. As this Court explained in *Beach v. Ocwen Federal Bank*, 523 U.S. 410 (1998), whether a statute extinguishes a right or merely bars a remedy is a matter of what "Congress intended"—an issue that, like all questions of statutory intent, depends in the first instance on the "plain language" of the relevant statute. *Id.* at 416.

In *Ocwen*, the Court explained that statutes whose terms provide that an action must be brought within a certain time, or that provide that it may not be brought after that time, are "typical statute[s] of limitation" that do not extinguish substantive rights. *Id.* The Court construed the statute at issue in *Ocwen* as extinguishing rights rather than limiting remedies because it "says nothing in terms of bringing an action but instead provides that the [underlying] 'right ... shall expire' at the end of the time period." *Id.* at 417. That is, the statute "talks not of a suit's commencement but of a right's duration, which it addresses in terms so straightforward as to render any limitation on the time for seeking a remedy superfluous." *Id.*

Section 77m, by contrast, talks only of a suit's commencement and says nothing about a right's duration. Entitled "Limitation of Actions," it frames *both* the one-year-after-discovery limitations period and the three-years-from-offering "repose" period in terms of when an "action ... to enforce a liability created under" other provisions of the securities laws may be "brought." 15 U.S.C. § 77m. Specifically, with respect to the three-year period, the statute provides: "In no event shall any such action be brought to enforce a liability created under section 77k or 77l(a)(1) of this title more than three years after the security was bona fide offered to the public, or under section 77l(a)(2) of this title more than three years after the sale." *Id.* The statute says nothing about the extinguishment or expiration of the liabilities created by sections 77k, 77l(a)(1), and 77l(a)(2). To paraphrase *Ocwen*, the statute addresses a suit's commencement in terms so straightforward as to render any charac-

terization of it as addressing the expiration of the underlying rights untenable.

That the statute's language and structure are incompatible with the application of a discovery rule (or equitable tolling principles that have the same effect) to the three-year period, *see Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991), does not change the statute's fundamental character as a limit on the time for filing suit. Of course, insofar as the "statute of repose" label applies to any limitations period measured solely from the time of the defendant's conduct rather than from the discovery or accrual of the plaintiff's claim, it can be applied to the three-year period in section 77m. *See, e.g., CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182 (2014) ("A statute of repose ... puts an outer limit on the right to bring a civil action[,] ... measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant."). But whether the label fits for that reason is an entirely different question from whether the three-year period functions to extinguish substantive rights rather than to limit the time for bringing an action. The conclusion that the statute must extinguish rights merely because it can be called a "statute of repose" on the basis of the events that trigger it is a non sequitur. What the limitations period *does* is a matter of what the statute *says*, and the plain language of the statute establishes that what it does is limit the time for bringing an action.

Moreover, this Court's decision in *CTS Corp.* does not indicate that statutes of repose are necessarily "substantive" limits on liability. Rather, this Court stated in *CTS Corp.* that, like statutes of limitations,

statutes of repose typically function by limiting "the right to *bring a civil action*." *Id.* (emphasis added). That is, in *Ocwen*'s terms, they function principally as a limit on the remedy. 523 U.S. at 417. As *CTS* explains, that limit is more categorical than a statute of limitations because, under a repose statute, the time in which an action can be brought is not triggered by "accrual," which depends on when the claim reasonably could have been discovered, but strictly on when underlying events occurred. *See* 134 S. Ct. at 2182. The legislative policy such a limit reflects is inconsistent with equitable tolling notions that excuse delays in suing if they do not reflect a lack of diligence on the part of the plaintiff. *See id.* at 2183; *see also Lampf*, 501 U.S. at 363. A repose period thus may function as the "equivalent" to a "cutoff" of the plaintiff's "temporal" ability to impose liability, *CTS*, 134 S. Ct. at 2183, but it remains fundamentally a remedial rather than substantive limit.[2]

B. The *American Pipe* rule does not modify substantive rights.

Even if the three-year "repose" period could be characterized as establishing "substantive rights" in some sense, however, it would not follow that Federal Rule of Civil Procedure 23 modifies substantive rights in violation of the Rules Enabling Act just because the

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[2] Of course, the nature of a particular statute of repose might indicate that it involves substantive rights. The state statute in *CTS*, for example, did not provide merely that a plaintiff's action could not be brought after a particular date, but that the action could not "accrue" after that date, and state decisional law indicated that such a statute constituted an "additional element of the claim." 134 S. Ct. at 2187 (citations omitted).

filing of a class action under the Rule helps determine the timeliness of the claims of class members. There is no question that Rule 23 satisfies the Rules Enabling Act's basic criterion that it "must 'really regulat[e] procedure'" by governing "'the manner and the means' by which the litigants' rights are 'enforced.'" *Shady Grove*, 559 U.S. at 407 (plurality). That proceedings under the Rule may have an effect on rights that are arguably substantive does not violate the Rules Enabling Act: "The test is not whether the rule affects a litigant's substantive rights; most procedural rules do." *Id.*

In particular, a federal procedural rule does not improperly modify substantive rights merely because it may affect the determination whether an action has been commenced on behalf of a litigant in satisfaction of relevant limitations periods. Rather, the determination of what filings satisfy, and halt the running of, a limitations period is procedural in nature. Thus, this Court held in *West v. Conrail*, 481 U.S. 35 (1987), that Federal Rule of Civil Procedure 3 determined whether an action had been timely commenced for purposes of federal limitations periods. *See id.* at 38–39. If federal procedural rules could not validly affect the determination of when a limitations period stops running, *West* would be inexplicable.[3]

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[3] In the context of the interplay of federal and state law implicated by federal diversity actions, the Court has held that Rule 3 does not by its terms control the question of satisfaction of a state statute of limitations when state law provides that the running of the statute is tolled only by service, as opposed to filing, of an action, because Rule 3 was not intended to address that subject. See *Walker v. Armco Steel Corp.*, 446 U.S. 740, 752–753 (1980). However, even when such state laws are at issue,

(*Footnote continued*)

In the class action context, no less than in *West*, recognizing that the Federal Rules may affect the determination of whether the relevant limitations periods have run does not modify substantive rights. By creating a procedural mechanism through which the claims of multiple class members may be brought in a single action by a representative plaintiff, Rule 23 creates a vehicle through which many individuals can simultaneously *satisfy* the relevant statute of limitations or repose by commencing an action within the time in which the statute provides that an action may be brought. *See American Pipe*, 414 U.S. at 550. But Rule 23 does not impair defendants' rights because it does not permit anyone to proceed with claims that were time-barred at the time the class action was commenced: It "neither change[s] plaintiffs' separate entitlements to relief nor abridge[s] defendants' rights," and it "leaves the parties' legal rights and duties intact." *Shady Grove*, 559 U.S. at 408. Thus, as *American Pipe* held, construing Rule 23 to provide that the filing of a class action satisfies a limitations statute for any class member even if the class is ultimately not certified or the class member is excluded from the class does not violate the Rules Enabling Act, regardless of "whether a time limitation is 'substantive' or 'procedural.'" 414 U.S. at 557–58.

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federal procedural law controls what forms of service are valid in an action in federal court, *see Hanna v. Plumer*, 380 U.S. 460 (1965), which in turn may determine whether an action has been timely served in satisfaction of state limitations laws. *See, e.g.*, *Datskow v. Teledyne, Inc.*, 899 F.2d 1298, 1303–04 (2d Cir. 1990); *Morse v. Elmira Country Club*, 752 F.2d 35, 38 (2d Cir. 1984).

II. Not applying *American Pipe* would make class members' right to recover dependent on class certification and substantially impair the due-process protection provided by the right to opt out of a class action seeking monetary relief.

The Second Circuit held below, and respondents maintain in this Court, that the filing of a class action stops the running of the "repose" period only for class members who fall within the definition of a class that is ultimately certified and who remain in the class rather than opting out. A decision not to certify the class, or to exclude from the class as certified someone whose claims were encompassed by the complaint originally filed, would, under respondents' view, bar claims that could have been pursued had the class been certified or the claimant remained within the class. Respondents' view would thus have the anomalous effect of making the putative class members' legal entitlement to the recovery they seek, and the success of the defendants in asserting a statute of limitations defense, dependent on the outcome of the class certification decision and on whether a class member remains in or opts out of the class.

Respondents' position boils down to the assertion that an individual's entitlement to relief is different inside and outside of a class action. That proposition is, to say the least, in tension with the fundamental reason why class actions are permissible under the Rules Enabling Act: Class actions neither "change plaintiffs' separate entitlements to relief nor abridge defendants' substantive rights; they alter only how the claims are processed." *Shady Grove*, 559 U.S. at

408 (plurality).[4] Thus, a plaintiff's right to obtain recovery cannot depend on whether the plaintiff asserts it inside or outside of a class action. *Tyson Foods*, 136 S. Ct. at 1046.

As a practical matter, class actions undoubtedly increase the number of plaintiffs whose rights are asserted in court and provide efficiencies that may in some cases make possible the assertion of claims that would not be litigated individually. But class actions do not provide individuals with claims they would not otherwise have, nor do they affect defendants' "aggregate liability" because they do not permit assertion of the claims of any class member who could not (in theory, at least) "bring a freestanding suit asserting his individual claim." *Shady Grove*, 559 U.S. at 408. By seeking to supplant the *American Pipe* rule with a regime in which there will be outcome determinative legal differences between the claims available to plaintiffs depending on whether the class is certified or whether a member remains within the class, respondents' position runs "contrary to the bedrock rule that the sole purpose of classwide adjudication is to aggregate claims that are individually viable." *Brown v. Plata*, 563 U.S. 493, 552 (2011) (Scalia, J., dissenting).

Making the entitlement of plaintiffs to recover dependent on whether they are part of a class would substantially impair the efficacy of a key feature of

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[4] Although the quoted language is from the plurality portion of *Shady Grove*, it was subsequently endorsed in Justice Ginsburg's dissenting opinion in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 696 (2010). Thus, five sitting Justices have explicitly endorsed it.

Rule 23—the right of class members to opt out of class actions seeking damages or other monetary relief under Rule 23(b)(3). This Court has held that because of the strong interest of individuals in controlling the prosecution of their own claims for damages, the opt-out right is necessary to ensure that class actions satisfy due-process norms. *Wal-Mart*, 564 U.S. at 363 (2011); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846–48 (1999); *Amchem*, 521 U.S. at 614–15, 617; *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

The due process right to opt out of class litigation of substantial individual damages claims rests largely on what this Court has referred to as the "day-in-court ideal," *Ortiz*, 527 U.S. at 846—that is, the interest of an individual in controlling litigation primarily affecting his or her personal financial interests. As a general matter, due process does not permit a person to be bound by a judgment on a claim in a case in which she is not named as a party. *See Smith v. Bayer*, 564 U.S. at 312–13; *Taylor v. Sturgell*, 553 U.S. 880 (2008). The judgment in a "properly conducted" class action is an exception to this principle, *Smith*, 564 U.S. at 314, but the proper conduct of a class action must itself comport with due-process safeguards. One of those safeguards is that a person with a live, potentially meritorious, and substantial claim for damages—a form of property protected by the Due Process Clause—may not be deprived of the right to conduct her own litigation of that claim unless she is provided adequate notice of the pendency of the class action and an opportunity to remove herself from the class. *See Shutts*, 472 U.S. at 812; *Ortiz*, 527 U.S. at 848; *Wal-Mart*, 564 U.S. at 363.

The importance of the opt-out right has led this Court and the lower federal courts to give the benefit of the *American Pipe* rule not only to members of a putative class that is not certified, or is certified in a way that excludes them from the class definition, but also to class members who exclude themselves by opting out. *See Crown Cork*, 462 U.S. at 351–52; *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 n.13 (1974); *Realmonte v. Reeves*, 169 F.3d 1280, 1284 (10th Cir. 1999) (citing cases). A "consistent line of circuit court cases hold[s] that the *American Pipe* tolling doctrine applies to plaintiffs who opt out of a class action in federal district court." *Grispino v. New England Mut. Life Ins. Co.*, 358 F.3d 16, 19 (1st Cir. 2004).

Holding *American Pipe* inapplicable to actions subject to the three-year limitations period of section 77m would effectively negate the opt-out rights of class members who must rely on the timely filing by the class representative to satisfy the statute, as they would be barred from pursuing their claims individually if they were to opt out. Thus, "the notice and opt-out provision of Rule 23(c)(2) would be irrelevant without tolling because the limitations period for absent class members would most likely expire, 'making the right to pursue individual claims meaningless.'" *Joseph v. Wiles*, 223 F.3d 1155, 1167 (10th Cir. 2000) (quoting *Realmonte*, 169 F.3d at 1284). As this Court put it in *Crown Cork*, the *American Pipe* tolling rule ensures that "the right to opt out and press a separate claims remain[s] meaningful." 462 U.S. at 351. Adoption of respondents' position, by contrast, would hold class members hostage to a class action unless they were willing to abandon their claims completely.

That result would not comport with due process. Class members in a timely filed damages class action undoubtedly have live and substantial interests in their individual damages claims. Permitting the claims' assertion only within the class action deprives class members of the entitlement to direct the litigation of their claims unless they have taken the otherwise pointless step of filing duplicative actions within the limitations period—actions that burden the judicial system and provide no genuine benefit to defendants' interests in repose. *See* Pet. Br. 22–24, 41–42. Requiring such needless and burdensome steps to protect the right to opt out is inconsistent with this Court's pragmatic, balancing approach to issues of due process. *See Mathews v. Eldridge*, 424 U.S. 319 (1976).

Negating opt-out rights would be particularly unfortunate in the context of settlement. Although most class settlements reflect a fairly negotiated compromise based on both sides' reasonable views of the potential value of the class's claims, that is not always the case: Class settlements also pose significant potential for abuse in circumstances where defendants' interests in extinguishing as many claims as possible as cheaply as possible may coincide with class counsel's interests in benefiting themselves (through fee awards) and small segments of the class at the expense of the class as a whole. *See, e.g.*, *In re Dry Max Pampers Litig.*, 724 F.3d 713, 717–18 (6th Cir. 2013); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 173–74 (3d. Cir. 2013); *Staton v. Boeing Co.*, 327 F.3d 938, 952–53, 959–65 (9th Cir. 2003); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784–800 (3d Cir. 1995).

The ability of absent class members to opt out is an important check against such abuses, as it allows class members to reject inadequate settlements by withdrawing to pursue their claims through alternative means, whether individual or class actions. *See id.* at 792.[5] The possibility of opt-outs also provides significant incentives to defendants and class counsel to negotiate fair settlements: The benefit to defendants of settling will be lost if too many class members opt out, while class counsel may face cuts in their fees if large portions of the class walk away and thus receive no share of the settlement.

For these reasons, courts have, particularly since this Court's decisions in *Amchem* and *Ortiz*, been unwilling to accept settlements of class members' damages claims that involve certification on a non-opt-out basis or otherwise fail adequately to protect opt-out rights.[6] Indeed, this Court's due process holding in

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[5] In some cases, when a class action is certified for litigation and later settles, the initial opt-out deadline may have expired before a settlement is reached, though the opt-out period sometimes will still be open when a settlement is first announced. By contrast, class members *always* retain opt-out rights after the announcement of a settlement if, as happened here, the certification of the class occurs only as the result of the settlement. As the Advisory Committee Notes to the 1983 revision of Rule 23 note, when "the class is certified and settlement is reached in circumstances that lead to simultaneous notice of certification and notice of settlement..., the basic opportunity to elect exclusion applies without further complication."

[6] *See, e.g.*, *In re Dry Max*, 724 F.3d at 717–18; *Hecht v. United Collection Bur., Inc.*, 691 F.3d 218, 222 (2d Cir. 2012); *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 191–99 (5th Cir. 2010); *Molski v. Gleich*, 318 F.3d 937, 951 (9th Cir. 2003); *In re Telectronics Pacing Sys., Inc.*, 221 F.3d 870, 881 (6th Cir. 2000); *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 897 (7th Cir. 1999).

Wal-Mart likely forecloses certification of a settlement class for substantial damages claims without providing absent class members the ability to opt out under Rule 23(b)(3). *See* 564 U.S. at 363.

Recent revisions to Rule 23 have underscored the importance of opt-out rights to a fair settlement process by allowing judges to order a second opt-out opportunity at the settlement stage even if the class was certified before settlement and an opt-out right was already provided at that time. *See* Fed. R. Civ. P. 23(e)(4). Both the judicial insistence that classwide damages claims be certified and settled through Rule 23(b)(3) opt-out classes and the rulemakers' addition of the second opt-out possibility reflect the importance of opt-out rights to prevent settlement abuses. They also embody the fundamental principle that the ability to opt out is essential to the legitimacy (and constitutionality) of a system in which the settlement of class members' claims is agreed to by other people—that is, class counsel and defendants. In particular, the addition of Rule 23(e)(4) reflects an explicit determination by the rulemakers that an opt-out opportunity following a settlement is in many cases fair because "[a] decision to remain in the class is likely to be more carefully considered and is better informed when settlement terms are known." Fed. R. Civ. P. 23, Advisory Comm. Notes to 2003 Revision.

Abandoning the *American Pipe* rule in cases governed by section 77m and similar "repose" provisions elsewhere in the securities laws would mean that, when the time came for settlement, class members would have nowhere else to go: They would face the Hobson's choice of accepting whatever settlement class counsel negotiated with the defendants (unless

it were disapproved by the court) or taking nothing. That result would not only invite unfairness and abuse, but also significantly affect the balance of power in settlement negotiations conducted by class counsel in perfect good faith, as the price of settlement would necessarily be affected because class members, deprived of their ability to opt out, would be effectively "disarmed." *Amchem*, 521 U.S. at 621.

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit should be reversed.

Respectfully submitted,

F. PAUL BLAND
PUBLIC JUSTICE, P.C.
1620 L Street NW
Suite 630
Washington, DC 20036
(202) 797-8600

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

Attorneys for Amici Curiae

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CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM,

Petitioner,

v.

ANZ SECURITIES, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RETIRED FEDERAL JUDGES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

ANDREW N. GOLDFARB
Counsel of Record
GRAEME W. BUSH
JOHN J. CONNOLLY
ZUCKERMAN SPAEDER LLP
1800 M Street, NW, Ste. 1000
Washington, DC 20036
(202) 778 1800
agoldfarb@zuckerman.com

Counsel for Amici

March 6, 2017

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. Federal Securities Class Actions Present Difficult Case Management Problems 3

II. The *IndyMac* Rule Followed Below Is Likely To Increase Protective Filings 7

III. Applying the Rule of *American Pipe* Would Minimize Case Management Issues and Promote a Fair Resolution of Securities Class Actions 14

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974) ..... passim

Aronson v. McKesson HBOC, Inc., 79 F. Supp. 2d 1146 (N.D. Cal. 1999) 12

Burke v. Ruttenberg, 102 F. Supp. 2d 1280 (N.D. Ala. 2000) 15

Chill v. Green Tree Fin. Corp., 181 F.R.D. 398 (D. Minn. 1998) 12

City of Detroit v. Goldman, Sachs & Co., No. 10 Civ. 4429 (MGC), 2014 WL 1257782 (S.D.N.Y. Mar. 27, 2014) 8

Crown, Cork & Seal Co. v. *Parker*, 462 U.S. 345 (1983) 7

DeJulius v. New England Health Care Emps. Pension Fund, 429 F.3d 935 (10th Cir. 2005) 16

Devlin v. Scardelletti, 536 U.S. 1 (2002) 8

Haines v. Kerner, 404 U.S. 519 (1972) 17

In re Baan Co. Sec. Litig., 186 F.R.D. 214 (D.D.C. 1999) 5, 12

In re Cendant Corp. Sec. Litig., 109 F. Supp. 2d 273 (D.N.J. 2000) 15

In re Cendant Corp. Sec. Litig., 404 F.3d 173 (3d Cir. 2005) 5, 13

In re Citigroup Inc. Bond Litig., 296 F.R.D. 147 (S.D.N.Y 2013) 1

In re Cmty. Bank of N. Va., 418 F.3d 277 (3d Cir. 2005) 17

In re Enron Corp. Sec. Litig., 206 F.R.D. 427 (S.D. Tex. 2002) 5, 15

In re First Union Corp. Sec. Litig., 157 F. Supp. 2d 638 (W.D.N.C. 2000) 15

In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (3d Cir. 1995) 13

In re Initial Pub. Offering Sec. Litig., 499 F. Supp. 2d 415 (S.D.N.Y. 2007) 17

In re Milken & Assocs. Sec. Litig., 150 F.R.D. 46 (S.D.N.Y. 1993) 1

In re Network Assocs., Inc. Sec. Litig., 76 F. Supp. 2d 1017 (N.D. Cal. 1999) 5, 12

In re Oxford Health Plans, Inc., Sec. Litig., 182 F.R.D. 42 (S.D.N.Y. 1998) 5

In re Telxon Corp. Sec. Litig., 67 F. Supp. 2d 803 (N.D. Ohio 1999) 14, 15

Jenkins v. *Missouri*, 78 F.3d 1270 (8th Cir. 1996) 17

Joseph v. Wiles, 223 F.3d 1155 (10th Cir. 2000).....8

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991).....8

Odle v. *Wal-Mart Stores, Inc.*, 747 F.3d 315 (5th Cir. 2014).....8

Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc., 721 F.3d 95 (2d Cir. 2013), *cert. granted sub nom., Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, 134 S. Ct. 1515 (2014), *cert. dismissed as improvidently granted*, 135 S. Ct. 42 (2014) ..... passim

Sakhrani v. Brightpoint, Inc., 78 F. Supp. 2d 845 (S.D. Ind. 1999) 4, 5

Simmons v. Spencer, No. 13 Civ. 8216 (RWS), 2014 WL 1678987 (S.D.N.Y. Apr. 25, 2014).....5

Stein v. Regions Morgan Keegan Sel. High Inc. Fd., 821 F.3d 780 (6th Cir. 2016) 11

Takeda v. Turbodyne Techs., Inc., 67 F. Supp. 2d 1129 (C.D. Cal. 1999).....12

Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308 (2007).....6

Wyser-Pratte Mgmt. Co. v. Telxon Corp., 413 F.3d 553 (6th Cir. 2005).....11

STATUTES

15 U.S.C. § 78u-4(a)(3)(A)(i) 3

15 U.S.C. § 78u-4(a)(3)(B).....3

15 U.S.C. § 78u-4(a)(3)(B)(ii) 5

15 U.S.C. § 78u-4(b)(1)-(2) 16

15 U.S.C. § 78u-4(b)(2)(A) 6

H.R. Conf. Rep. No. 104-369 (1995) 4

Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 ..... passim

TREATISES

3 WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS (5th ed. 2013) 9, 18, 19

5 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS (4th ed. 2002) 8

7B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE (3d ed. 2005) 16

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OTHER AUTHORITIES

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Elliott J. Weiss, *The Lead Plaintiff Provisions of the PSLRA After a Decade, or "Look What's Happened to My Baby,"* 61 VAND. L. REV. 543 (2008) 5

J. Rosenbloom, *Exploring Methods to Improve Management and Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York*, 30 FORDHAM URB. L.J. 305 (2002) 21

Lawsuit News, Business Wire, https://www.Businesswire.com/portal/site/home/news/subject/?vnsId=31361 (last visited Mar. 6, 2017) 4

Restatement (Second) of Trusts § 177 (1959) 15

Stefan Boettrich & Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2016 Full-Year Review* 21 (2017), *available at* http://www.nera.com/content/dam/nera/publications/2017/PUB_2016_Securities_Year-End_Trends_Report_0117.pdf 7, 12

INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are former federal district court judges who have experience adjudicating class action cases under securities and other laws. The attached Appendix contains a list of the *amici* along with biographical information for each. *Amici* are interested in this case because of their years of service to the federal judiciary and their ongoing commitment to ensure that federal judges have the means to manage their caseloads and dispense equal justice under law to all litigants.

Amici urge the Court to reverse the decision below and to hold that the rule announced in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), applies to the three-year time limitation in § 13 of the Securities Act of 1933 for asserted class members.[2]

SUMMARY OF ARGUMENT

Securities class actions are among the most complicated and time-consuming actions that come before federal district courts. *See, e.g., In re Citigroup Inc. Bond Litig.*, 296 F.R.D. 147, 155 (S.D.N.Y. 2013); *In re Milken & Assocs. Sec. Litig.*, 150 F.R.D. 46, 53 (S.D.N.Y. 1993). In the judgment of *amici*, the rule of

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[1] All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part and no person or entity other than *amici* or their counsel made a monetary contribution for the preparation or submission of this brief.

[2] *Amici* take no position on the merits of this or other securities class actions.

American Pipe has had a salutary effect on management of securities class actions, and a substantial erosion of that rule would burden federal judges and federal courts without materially improving justice to the parties. In particular, *amici* envision an increase in "protective filings" if the decision below is affirmed. That is, a holding by this Court that the *American Pipe* rule does not apply to the three-year time limitation in § 13 of the Securities Act could cause unnamed class members in pending and future securities class actions to move to intervene in class cases, or file their own independent actions, simply to preserve their claims. These filings will complicate the already difficult process of choosing a lead plaintiff in a securities class action. They may also create competing factions of plaintiffs who may burden federal courts with duplicative filings and intra-party disputes. Further, a substantial increase in multidistrict litigations could ensue if unnamed class members choose to file independent suits in districts most convenient for them, but which might differ from the district in which the class case is proceeding. A single, consolidated class action could thus become subject to an MDL procedure that would expend more of the judiciary's time and resources than necessary. *Amici* also envision an increase in *pro se* filings by investors, which create special burdens for the court system. Applying *American Pipe* to § 13's three-year period (and similar provisions in the federal securities laws),[3] by contrast, will promote an orderly

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[3] This Court has likened § 13 to certain time-for-suit provisions in the Securities Exchange Act of 1934. *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 359-61 (1991).

procedure through which the court can determine whether the claims are suitable for class-based relief, and manage the case thereafter toward a fair resolution based on the facts and the law.

ARGUMENT

I. FEDERAL SECURITIES CLASS ACTIONS PRESENT DIFFICULT CASE MANAGEMENT PROBLEMS.

Securities class actions present unique challenges that make them among the most difficult cases for federal district courts to manage. *Amici* are concerned about any change in class action procedure that threatens to exacerbate those difficulties.

In the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 737, Congress created a special set of procedures to govern a federal securities class action suit. The earliest stage of the case often is dominated by selection of a "lead plaintiff," a process intended to ensure that the litigation is managed for the class by an investor with a large financial interest in the relief sought by the class. *See* 15 U.S.C. § 78u-4(a)(3)(B). To ensure selection of an appropriate lead plaintiff, the plaintiff who files a securities class-action complaint has 20 days to "cause to be published, in a widely circulated national business-oriented publication or wire service, a notice advising members of the purported plaintiff class" of "the pendency of the action, the claims asserted therein, and the purported class period." 15 U.S.C. § 78u-4(a)(3)(A)(i). The notice also provides that any member of the purported class has 60 days to move the court to serve as lead plaintiff. *Id.*

These provisions were intended in part to encourage sophisticated institutional investors to serve as lead plaintiffs. *E.g.*, H.R. Conf. Rep. No. 104-369, at 34 (1995). The notices are not sent solely to institutional investors, of course; they are published in business media and are read by individual investors, financial advisors, and class-action lawyers, who must decide what action to take when they or their clients bought or sold securities in the defendant company during the relevant period.

Scores of these notices are available for review on sites such as Business Wire.[4] They typically provide a summary of the claims and the deadline for filing a motion to serve as lead plaintiff. Many also indicate that class members need not take any action to be a member of the class, and they invite class members to call the named plaintiff's law firm if they have questions. Law firms often form an ad hoc "group of persons" from the investors who contact them, and then move the court to appoint the group as lead plaintiff. *See Sakhrani v. Brightpoint, Inc.*, 78 F. Supp. 2d 845, 850-51 (S.D. Ind. 1999) (volunteers for lead plaintiff "are often collected by inviting investors who read the national notice under the PSLRA to send in a form to a law firm"); Elliott J. Weiss, *The Lead Plaintiff Provisions of the PSLRA After a Decade, or "Look What's Happened to My Baby,"* 61 VAND. L. REV. 543, 560 (2008).

In many cases multiple plaintiffs using different law firms file similar securities class-actions against

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[4] *See* Lawsuit News, Business Wire, https://www.Businesswire.com/portal/site/home/news/subject/?vnsId=31361 (last visited Mar. 6, 2017).

the same defendant. *E.g.*, *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 196 (3d Cir. 2005) (noting that 62 complaints were filed on behalf of the class); *In re Network Assocs., Inc. Sec. Litig.*, 76 F. Supp. 2d 1017, 1019 (N.D. Cal. 1999) (noting that 19 class actions were filed promptly after decline in stock prices). These competing complaints are often the subject of a motion for consolidation, which the district judge must adjudicate before appointing a lead plaintiff. *See* 15 U.S.C. § 78u-4(a)(3)(B)(ii).

The appointment of a lead plaintiff is often contested by competing factions of plaintiffs. *E.g.*, *In re Enron Corp. Sec. Litig.*, 206 F.R.D. 427, 439-40 (S.D. Tex. 2002) (considering motions for appointment of lead counsel). District judges, consistent with the intent of the PSLRA, generally try to manage these early skirmishes by limiting the number of lead plaintiffs. *E.g.*, *Sakhrani*, 78 F. Supp. 2d at 854 (naming only one lead plaintiff—the individual investor with the largest losses during the class period); *compare In re Oxford Health Plans, Inc., Sec. Litig.*, 182 F.R.D. 42, 47 (S.D.N.Y. 1998) (concluding interests of the proposed class would be best served by a group of three co-lead plaintiffs). In *In re Baan Co. Securities Litigation*, 186 F.R.D. 214, 217 (D.D.C. 1999), for instance, the district judge observed that "a small committee will generally be far more forceful, effective and efficient than a larger aggregation." Consequently, "[t]he Lead Plaintiff decision should be made under a rule of reason but in most cases three should be the initial target, with five or six as the upper limit." *Id.*; *e.g.*, *Simmons v. Spencer*, No. 13 Civ. 8216 (RWS), 2014 WL 1678987 (S.D.N.Y. Apr. 25, 2014) (appointing two lead plaintiff

applicants, a total of six individuals, to serve as co-lead plaintiffs).

Many additional complexities arise after the lead plaintiff is selected. Motions to dismiss are filed in roughly 94 percent of securities class actions, Stefan Boettrich & Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2016 Full-Year Review* 21 (2017), *available at* http://www.nera.com/content/dam/nera/publications/2017/PUB_2016_Securities_Year-End_Trends_Report_0117.pdf, and the heightened pleading standards under the PSLRA, which apply to fraud-based claims, often result in hotly contested disputes at the pleading stage. Moreover, those motions to dismiss often turn on whether plaintiffs have satisfied the PSLRA's requirement that, with respect to each allegedly fraudulent act or omission, they "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2)(A). Resolving that question often requires that the district judge take a hard look at the plaintiffs' allegations and, where appropriate, materials subject to judicial notice. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322-23 (2007). If the case proceeds after the initial motions are resolved, the district judge must structure and monitor discovery, rule on a motion for certification, adjudicate motions for summary judgment, design and manage a trial (in the comparatively few cases that are tried), review and approve settlement agreements—including conducting fairness hearings—address objections from class members, and address questions of attorneys' fees. In high-stakes class actions, many of these events are intensely litigated. Others, such as

settlement and attorneys' fees, may not be contested at all, and the district judge must perform an independent analysis to ensure compliance with the letter and spirit of Federal Rule of Civil Procedure 23. *See generally* BARBARA J. ROTHSTEIN & THOMAS E. WILLGING, MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES 1-3 (3d ed. 2010). District judges themselves may have duties to absent class members, particularly at the settlement stage. *See id.* at 12.

II. THE *INDYMAC* RULE FOLLOWED BELOW IS LIKELY TO INCREASE PROTECTIVE FILINGS.

In *American Pipe* and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), this Court concluded that the running of a statute of limitations should be suspended for the claims of absent class members during the pendency of a class action complaint. Each of those decisions was grounded in part on the concern that a contrary rule would induce potential class members "to file protective motions to intervene or to join in the event that a class was later found unsuitable." *American Pipe*, 414 U.S. at 553; *see also Crown, Cork & Seal*, 462 U.S. at 353-54. In essence, the *American Pipe* rule vindicates the case management principles embedded in Rule 23. As the Court observed in *American Pipe*, a "federal class action is no longer 'an invitation to joinder' but a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." 414 U.S. at 550.

Scores of appellate and district judges have endorsed that reasoning in securities class actions. *E.g.*, *Odle* v. *Wal-Mart Stores, Inc.*, 747 F.3d 315, 323 n.45 (5th Cir. 2014); *Joseph v. Wiles*, 223 F.3d 1155, 1167 (10th Cir. 2000); *Police & Fire Ret. Sys. of City of Detroit v. Goldman, Sachs & Co.*, No. 10 Civ. 4429 (MGC), 2014 WL 1257782, at *8 (S.D.N.Y. Mar. 27, 2014). Indeed, this Court has consistently adhered to that reasoning, including in at least one case decided after *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 359-61 (1991). In *Devlin v. Scardelletti*, 536 U.S. 1 (2002), the Court noted that nonnamed class members are "parties in the sense that the filing of an action on behalf of the class tolls a statute of limitations against them." *Id.* at 10. "Otherwise," the Court added, "all class members would be forced to intervene to preserve their claims, and one of the major goals of class action litigation—to simplify litigation involving a large number of class members with similar claims—would be defeated." *Id.*

Over the decades the *American Pipe* doctrine crystallized into a settled expectation that potential class members need *not* intervene in a class action or file their own complaint to preserve their claims, at least until class certification has been denied. In 2002, the Fourth Edition of the leading treatise on class actions stated, "Because the filing of the class complaint tolls the statute of limitations for the class, class members may simply await the outcome of the suit." 5 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 16:6, at 146 (4th ed. 2002) (footnote omitted). But by the time the Fifth Edition was published in 2013, that statement had become a "general rule" followed by 16 sections of

caveats and exceptions, as the lower courts considered the bewildering permutations of the *American Pipe* rule in the class action context. *See* 3 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS §§ 9:53 to 9:68 (5th ed. 2013). The 2016 supplement adds a new section addressing the issue raised by Petitioner; the authors conclude with the observation that the dismissal of the writ in *Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013), *cert. granted sub nom., Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, 134 S. Ct. 1515 (2014), *cert. dismissed as improvidently granted*, 135 S. Ct. 42 (2014), left "the split in the circuits to be resolved another day." *Id.* § 9:69, at 58 (Supp. 2016).

In *IndyMac*, the Second Circuit held that the *American Pipe* tolling rule does not apply to § 13's three-year period. 721 F.3d at 101. In the decision below, the court of appeals followed *IndyMac* to dismiss claims that the plaintiff had filed, after opting out of a putative class action, outside of § 13's three-year period. Pet. App. 1a-6a. If upheld by this Court, the *IndyMac* rule will contribute to the growing confusion about *American Pipe* tolling in class action cases. The effect, *amici* believe, will be a trend toward duplicative filings in securities class action cases, which will complicate their management and administration. *Amici* believe this based on their experience and judgment, for the following reasons.

First and foremost, potential class members will have a strong incentive to file motions to intervene or separate complaints to ensure that any time limitation characterized as a "statute of repose" is not later held to bar their claims. One research firm reports that the median time from the filing of a

securities class action complaint to a decision on class certification is about 2.5 years. Boettrich & Starykh, *supra*, at 23. (The median time between the end of the class period and the filing of the first complaint is only 13 days, but the mean is 69 days. *Id.* at 18.) Another researcher reports that the median time to settlement was three years in 2015, with longer periods for larger cases. Cornerstone Research, *Securities Class Action Settlements – 2015 Review and Analysis* 19 (2016), *available at* http://securities.stanford.edu/research-reports/1996-2015/Settlements-Through-12-2015-Review.pdf. Thus, sophisticated parties know that a three-year statutory period may expire well before the rights of absent class members are adjudicated. Indeed, under the rule followed by the court of appeals below, even if a class is certified within the three-year period, absent class members are not protected if the class is later *decertified* outside the three-year period.

The Second Circuit appears to embrace, or at least be agnostic to, the prospect of multitudinous, duplicative litigation resulting from potential class members' filing motions to intervene or separate actions to protect their rights. As the court put it in *IndyMac*, "through minimal diligence, [the proposed intervenors] could have avoided the operation of the Section 13 statute of repose simply by making timely motions to intervene in the action as named plaintiffs, or by filing their own timely actions and, if prudent, seeking to join their claims under Federal Rule of Civil Procedure 20 (joinder)." *Id.* at 112. *Amici* believe that such a regime would place an undue

burden on district courts, and is both unwarranted and undesirable.[5]

Second, as a result of the PSLRA's publication requirement, potential members of securities class actions may receive early notice of the litigation and ready access to counsel. Federal securities class actions are filed and litigated by a plaintiffs' bar that tends to be sophisticated and highly competitive. These lawyers stay abreast of major events in the capital markets, and they are immediately made aware of class action complaints filed by competing plaintiffs' firms. When a securities class action is filed, plaintiffs' lawyers have an obligation, as well as an incentive, to notify potential class members of the action. Many of these potential class members contact one or more of the plaintiffs' firms who are competing to represent the lead plaintiff. Even before the court of appeals' decision in *IndyMac*, law firms representing investors have sometimes "signed up"

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[5] *Amici* note that, in the Sixth Circuit, the incentive for potential class members to act before the statute of limitations runs, either through early intervention or filing a separate action, is particularly acute. In *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F.3d 780 (6th Cir. 2016), the Sixth Circuit followed *IndyMac*. However, that circuit has also declined to extend *American Pipe* tolling to a potential class member who files her own action beyond the statute of limitations but before the trial court rules on class certification. *Wyser-Pratte Mgmt. Co. v. Telxon Corp.*, 413 F.3d 553 (6th Cir. 2005). As the court recognized in *Stein*, to protect her rights in the Sixth Circuit, a potential class member currently must either file before the limitations period expires or hope that the district court decides class certification before the "statute of repose" period runs. 821 F.3d at 795 n.6. Any rational potential class member will choose the former, which will lead to more protective filings.

thousands of potential class members as part of the initial process of choosing a lead plaintiff. *See, e.g.*, *Network Assocs.*, 76 F. Supp. 2d at 1019 (noting that one law firm claimed to represent a group of more than 1,725 investors, and another claimed over 100 institutions and "thousands" of individuals); *Aronson v. McKesson HBOC, Inc.*, 79 F. Supp. 2d 1146, 1154 (N.D. Cal. 1999) ("groups as large as 4,000 plaintiffs strong are vying for appointment" as lead plaintiff); *Takeda v. Turbodyne Techs., Inc.*, 67 F. Supp. 2d 1129, 1135 (C.D. Cal. 1999) (two competing groups of "several hundred investors"); *In re Baan Co.*, 186 F.R.D. at 217 (group of 466); *Chill v. Green Tree Fin. Corp.*, 181 F.R.D. 398, 408-09 (D. Minn. 1998) (roughly 300). If the *IndyMac* rule followed below prevails, it seems likely that plaintiffs' counsel will need to inform potential class members that they *cannot* merely sit by and assume that their rights are protected.

Third, many securities are held through funds operated by professional managers. Investment managers are fiduciaries who have a duty to keep investors informed of rights and opportunities associated with their investments. *See* RESTATEMENT (SECOND) OF TRUSTS § 177 (1959) ("The trustee is under a duty to the beneficiary to take reasonable steps to realize on claims which he holds in trust."). As a result, they are likely to monitor Business Wire and other sites that publish notices of class action filings. After learning of a class action involving securities held by their investors, investment professionals may feel obligated to tell their clients that they should analyze the pleadings to form a legal judgment about whether intervention is advisable. At minimum, this imposes additional costs on investors,

and it could impose substantial burdens on the courts if investment professionals push investors to protect their rights by filing complaints or motions to intervene.

Finally, a lead plaintiff in a securities class action owes a fiduciary duty to the class. *In re Cendant*, 404 F.3d at 198. Class counsel likewise owes a fiduciary duty to putative class members upon the filing of a class complaint. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 801 (3d Cir. 1995). Whether that duty extends to notifying class members about the possible imposition of a time bar is not clear, but again, under the *IndyMac* rule the safer course for a fiduciary may be to notify class members that their claims are not protected against the time limitation unless they file a complaint or motion to intervene. Such an outcome would impose additional costs on plaintiffs or their counsel, who must pay for such notice. Also, adding another notice obligation to those required by the PSLRA and Rule 23 may confuse potential class members about the substance and import of the different notices they receive during a securities class action.

To be sure, under the *IndyMac* rule putative class members could still delay filing a complaint or motion to intervene until just before expiration of the three-year period. However, plaintiffs may decide that the wiser course is to make a protective filing early in the case, rather than monitor the litigation, calendar key dates, and form periodic judgments about whether intervention is advisable. In any case, motions to intervene and separate complaints substantially burden the courts, regardless of whether they are

filed shortly after a complaint or immediately before the expiration of a limitations period.

Amici cannot say how many additional motions to intervene or separate complaints will be filed if the *IndyMac* rule followed below stands. Under the *American Pipe* rule regularly applied prior to the Second Circuit's decision in *IndyMac*, however, virtually none of these putative class members file papers with the court or otherwise participate in the proceedings if they are not selected as lead plaintiff. They have had little reason to do so in light of the longtime understanding that their claims would not be extinguished while the class action proceeds.

III. APPLYING THE RULE OF *AMERICAN PIPE* WOULD MINIMIZE CASE MANAGEMENT ISSUES AND PROMOTE A FAIR RESOLUTION OF SECURITIES CLASS ACTIONS.

As noted *supra*, district judges presiding over securities class actions frequently conclude that the interests of justice and efficiency are served by limiting the number of representative plaintiffs. In *In re Telxon Corp. Securities Litigation*, 67 F. Supp. 2d 803 (N.D. Ohio 1999), for instance, 27 parties filed class action complaints. All agreed that the cases should be consolidated, but three groups competed for lead plaintiff status. One group consisted of 18 individual plaintiffs who alleged collective losses of some $3 million during the class period. Although this amount exceeded the loss of the other candidates, the court declined to name the group as lead plaintiff, reasoning that "[t]he larger the group, the less incentive any single member of the group—

and certainly the group as a whole—will have to exercise any supervision or control over the litigation." *Id.* at 815. Moreover, the court added, "[t]he greater the number of persons comprising the group, the more difficult it is for those persons to communicate with each other, and to speak with a single, coherent voice when making decisions about the conduct of the litigation . . . ." *Id.* at 815-16; *see also In re Cendant Corp. Sec. Litig.*, 264 F.3d 201, 267 (3d Cir. 2001) ("At some point, a group becomes too large for its members to operate effectively as a single unit."); *Enron*, 206 F.R.D. at 442; *Burke v. Ruttenberg*, 102 F. Supp. 2d 1280, 1336-37 (N.D. Ala. 2000) ("the larger the group, the greater the costs"), *vacated on other grounds*, 317 F.3d 1261 (11th Cir. 2003).[6]

If the Second Circuit's approach to § 13 is sustained, the problem in finding a "single, coherent voice" for the class could become more difficult. The *IndyMac* court foresaw two options for absent class members to preserve their claims: filing a separate complaint (and possibly moving for joinder), or filing a timely motion to intervene. *See* 721 F.3d at 112. Few *pro se* investors have the training and experience to draft a complaint that satisfies the PSLRA's

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[6] To be sure, a number of courts have allowed multiple parties to serve in a group as lead plaintiffs. But these cases appear to turn on the cohesiveness of the group. *See, e.g., In re First Union Corp. Sec. Litig.*, 157 F. Supp. 2d 638 (W.D.N.C. 2000). When there are "multiple groups of plaintiffs and institutional investors all vying against each other for appointment as lead plaintiff," then "concerns regarding control of the litigation vis-à-vis the best interests of the class members [are] a relevant inquiry." *Id.* at 643.

standards. *See* 15 U.S.C. § 78u-4(b)(1)-(2); *Tellabs*, 551 U.S. at 313 ("The PSLRA requires plaintiffs to state with particularity both the facts constituting the alleged violation, and the facts evidencing scienter ...."). Moreover, the fee for filing a complaint in federal court is currently $400—a significant impediment for someone who is simply trying to preserve a claim—whereas there is no fee for filing a motion to intervene. It thus stands to reason that putative class members would be more likely to file motions to intervene.

But motions to intervene are themselves subject to a complex procedure and analysis, and adjudicating scores of them in the class action context could consume substantial resources of the court and the parties. The motion must "state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought." FED. R. CIV. P. 24(c). The movant must meet the standard for intervention, of right or permissive, under Rule 24(a) or (b), respectively. *E.g.*, *DeJulius v. New England Health Care Emps. Pension Fund*, 429 F.3d 935, 942-43 (10th Cir. 2005).[7] Although motions to intervene tend to be granted liberally in class actions, defendants can and do oppose them, and the

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[7] Under Rule 23(c)(2)(B)(iv), for classes certified under Rule 23(b)(3), the notice provided to class members after class certification must include a statement that "a class member may enter an appearance through an attorney if the member so desires." This does not mean, however, that absent class members have an automatic right to intervene in Rule 23(b)(3) classes. *See* 7B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1799, at 252-53 (3d ed. 2005).

case law reflects the many issues that can arise. *E.g.*, *In re Cendant Corp. Sec. Litig.*, 109 F. Supp. 2d 273, 276-79 (D.N.J. 2000) (movant not member of class and thus could not intervene as of right, although permissive intervention granted for limited purpose), *aff'd*, 264 F.3d 286 (3d Cir. 2001); *In re Initial Pub. Offering Sec. Litig.*, 499 F. Supp. 2d 415 (S.D.N.Y. 2007) (intervention to challenge lead counsel would cause undue delay); *Jenkins* v. *Missouri*, 78 F.3d 1270, 1275 (8th Cir. 1996) (no intervention as of right in civil rights class action when named plaintiffs were adequately representing interests of proposed intervenors); *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 315 (3d Cir. 2005) (the "goals of Rule 23 would be seriously hampered" if absent class members "who merely express dissatisfaction with specific aspects of the proposed settlement . . . have the right to intervene").

That many of these putative intervenors are likely to be *pro se* will add to the case management difficulty. In any proceeding, *pro se* parties consume more than their share of judicial and administrative resources. They are often unfamiliar with electronic case filing and local and federal rules designed to expedite litigation; they are difficult to notify; and their papers often must be reviewed with a heightened degree of interpretive leniency, *see, e.g.*, *Haines v. Kerner*, 404 U.S. 519, 520 (1972). *See* J. Rosenbloom, *Exploring Methods to Improve Management and Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York*, 30 FORDHAM URB. L.J. 305, 306-09 & nn. 5-19 (2002) (discussing judicial and administrative problems with *pro se* cases). In a complex class action, managing an influx of *pro se* motions to intervene or

separate complaints could occupy substantial judicial resources. Handling *pro se* matters is part of a federal court's function, of course, but it hardly seems a good use of resources when the *pro se* parties' interests are already represented by counsel specifically chosen for their expertise.

The *IndyMac* rule followed below also could complicate discovery and other procedural aspects of litigation that are sometimes awkward and cumbersome in class actions. Typically, discovery from absent class members is "disfavored" (although not flatly prohibited), in part because such discovery would "threaten[] to undermine the efficiency of representative litigation." *See* 3 WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS § 9:11, at 419, 417 (5th ed. 2013) (footnotes omitted). The test for permitting discovery from absent class members is itself complex and nuanced, and frequently disputed. *See id.* §§ 9:12-9:17, at 420-429. But even absent class members "can lose their effective immunity from most discovery by becoming actively involved in the litigation." *Id.* § 9:12, at 423. Class members who intervene or file their own complaints presumably would be subject to the full range of discovery devices, just as they could utilize those devices offensively to develop their cases. *See* 7C WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1920 (3d ed. 2007), at 611 ("the intervenor is entitled to litigate fully on the merits once intervention has been granted"). Many proposed intervenors would have little interest in propounding discovery, but they will incur considerable cost and risk if, for instance, they are obligated to make initial disclosures under Rule 26(a) and respond to

interrogatories under Rule 33 or document requests under Rule 34.

In addition, courts often treat absent class members differently from class representatives with respect to counterclaims—a wrench in the class action machinery. Many courts disfavor counterclaims against absent class members for case management and other reasons, including questions of personal jurisdiction over absent members. 3 WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS §§ 9:24-9:28, at 456-77. By contrast, courts often permit (and may even require) counterclaims against representative parties. *See id.* § 9:29, at 478-81. If absent class members feel impelled to intervene or file separate complaints to preserve their claims, class action defendants will likely react by filing counterclaims against the intervening plaintiffs, where warranted. This can only complicate the litigation for both the parties and the courts.

Finally, the Second Circuit's rule, if upheld, may require district courts to give additional scrutiny to the timing and content of notices required under Rule 23. Members of a class certified under Rule 23(b)(3) must receive notice that the court will exclude from the class any member who requests exclusion. FED. R. CIV. P. 23(c)(2)(B)(v). Likewise, a court may refuse to approve a potential settlement of a class action with a certified Rule 23(b)(3) class unless the proposed settlement "affords a new opportunity to request exclusion to individual class members" who previously did not do so. FED. R. CIV. P. 23(e)(4). Given that one or both of these notices may, and often do, occur after the three-year period in § 13, courts will need to consider whether to accelerate the pace of

securities class action litigation to ensure that any Rule 23 notice occurs in time to make a class member's opt-out rights meaningful. At minimum, when notice goes out to a class beyond the three-year period in § 13, a district court will need to assess whether the notice must alert class members that opting out of the class would end any chance for recovery under the Securities Act because those rights have expired.

Amici reiterate that they are neutral about the substantive issues of securities law raised by the parties in this litigation. Based on their collective experience and judgment, however, *amici* believe that this Court's endorsement of the *IndyMac* rule followed in the decision below would exacerbate district courts' administrative and judicial difficulties in managing securities class actions.

CONCLUSION

For the reasons stated, the Court should reverse the decision below.

Respectfully submitted,

ANDREW N. GOLDFARB
Counsel of Record
GRAEME W. BUSH
JOHN J. CONNOLLY
ZUCKERMAN SPAEDER LLP
1800 M Street, NW, Ste. 1000
Washington, DC 20036
202 778 1800
agoldfarb@zuckerman.com

APPENDIX

APPENDIX

List of *Amici*

The Hon. Frank C. Damrell, Jr. (ret.) served on the United States District Court for the Eastern District of California from 1997 to 2011. He served on the Judicial Panel on Multidistrict Litigation from 2008 to 2011. Judge Damrell is currently a principal at Cotchett, Pitre & McCarthy LLP.

The Hon. William Royal Furgeson, Jr. (ret.) served on the United States District Court for the Western District of Texas from 1994 to 2013. He served on the Judicial Panel on Multidistrict Litigation, was President of the Federal Judges Association, and was a member of the Judicial Branch Committee of the Judicial Conference of the United States. Judge Furgeson is currently Dean of the University of North Texas at Dallas College of Law.

The Hon. Nancy Gertner (ret.) served on the United States District Court for the District of Massachusetts from 1994 to 2011. Judge Gertner is currently a Professor of Practice at Harvard Law School.

The Hon. G. Patrick Murphy (ret.) served on the United States District Court for the Southern District of Illinois from 1998 to 2013, including serving as chief judge from 2000 to 2007. Judge Murphy is currently a partner at Murphy & Murphy, LLC.

The Hon. T. John Ward (ret.) served on the United States District Court for the Eastern District of Texas from 1999 to 2011. He served on the Judicial Conference Committee on Court Administration and Court Management from 2003 to 2009. Judge Ward is currently a partner at the Ward & Smith Law Firm.

The Hon. Alexander Williams, Jr. (ret.) served on the United States District Court for the District of Maryland from 1994 to 2014. Judge Williams is currently on the faculty of the Howard University Law School.

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IN THE

Supreme Court of the United States

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM,

Petitioner,

v.

ANZ SECURITIES, INC., ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF FOR THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AND THE CLEARING HOUSE ASSOCIATION L.L.C. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

KEVIN CARROLL
SECURITIES INDUSTRY AND
FINANCIAL MARKETS
ASSOCIATION
1101 New York Ave., NW
Washington, DC 20001

JEREMY R. NEWELL
PAIGE E. PIDANO
THE CLEARING HOUSE
ASSOCIATION L.L.C.
1101 Pennsylvania Ave., NW
Suite 720 North Tower
Washington, DC 20004

MARK A. PERRY
Counsel of Record
DAVID A. SCHNITZER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., NW
Washington, DC 20036
(202) 955-8500
mperry@gibsondunn.com

Counsel for Amici Curiae

QUESTION PRESENTED

Section 13 of the Securities Act provides that "in no event shall any action be brought" more than three years after the offering or sale at issue. 15 U.S.C. § 77m. This Court has held that this statute of repose is "absolute" (*CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175, 2183 (2014)) and "inconsistent with tolling." *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 363 (1991). The question addressed by *amici* is whether the filing of a class action automatically tolls Section 13 such that a lawsuit can be brought more than three years after the offering being challenged.

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. The Absolute Time Limitation In Section 13 Cannot Be Tolled 5

A. Tolling Must Be "Consonant With The Legislative Scheme" 5

B. Section 13 Is "Inconsistent With Tolling" 6

II. Petitioner's Policy Arguments Are Unavailing 13

A. Protective Filings Are Not A Problem 13

B. Repose Serves The Interests Of All Participants In The Securities Markets 18

CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

Cases

American Pipe & Constr. Co. v. *Utah*,
414 U.S. 538 (1974) ..... *passim*

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939 F.2d 1420 (10th Cir. 1991) 8, 13

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No. 2:13-cv-03865, 2014 WL 12538151
(C.D. Cal. Oct. 21, 2014) 17

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462 U.S. 650 (1983) 6

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987 F. Supp. 2d 377 (S.D.N.Y. 2013) 19

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462 U.S. 345 (1983) 22

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134 S. Ct. 2175 (2014) ..... *passim*

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437 U.S. 322 (1978) 5

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v. *Gilbertson*,
501 U.S. 350 (1991) 3, 7, 13, 22

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299 U.S. 248 (1936) 17

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559 U.S. 633 (2010) 3, 7, 13

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No. 15-927, 2017 WL 1050978
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Joshua H. Vinik et al., *Why Institutional Investors Are Opting Out of Class-Action Litigation*, Pensions & Invs. (July 25, 2011) 23

INTEREST OF *AMICI CURIAE*[*]

The Securities Industry and Financial Markets Association (SIFMA) is a securities industry trade association representing the interests of over 350 broker-dealers, banks, and asset managers. SIFMA's members and their nearly 1 million employees provide access to the capital markets, raising over $2.5 trillion for businesses and municipalities in the U.S., serving clients with over $20 trillion in assets, and managing more than $67 trillion in assets for individual and institutional clients including mutual funds and retirement plans.

The Clearing House, established in 1853, is the oldest banking association and payments company in the U.S. It is owned by the world's largest commercial banks, which hold more than half the deposits and employ over one million people in the U.S. They have more than two million employees worldwide. The Clearing House Association L.L.C. is a nonpartisan advocacy organization that represents the interests of its owner banks by developing and promoting policies to support a safe, sound, and competitive banking system that serves customers and communities. Its affiliate, The Clearing House Payments Company L.L.C., is regulated as a systemically important financial market utility. It owns and operates payments technology infrastructure that provides safe and efficient

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[*] All parties have consented to the filing of this brief. *Amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Certain respondents and their owners are members of SIFMA and owners of The Clearing House.

payment, clearing, and settlement services to financial institutions, and clears almost $2 trillion every day.

SIFMA and The Clearing House regularly file *amicus curiae* briefs in cases implicating issues of vital concern to participants in the securities industry. This case raises particularly significant concerns, as their members are routinely named in lawsuits brought under the provisions of the Securities Act at issue. In 2015, for example, underwriters were named as defendants in 76 percent of Section 11 cases. Cornerstone Research, *Securities Class Action Settlements: 2015 Review and Analysis* 15 (2016).

The interests of *amici* and their members are jeopardized by petitioner's argument that under *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), Section 13's absolute cut-off for Section 11 suits may (or perhaps must) be "tolled" for years on end if a class action is filed. Congress meant what it said in Section 13—that "*[i]n no event* shall any ... action be brought to enforce a liability created under [Section 11] more than three years after the security was bona fide offered to the public." 15 U.S.C. § 77m (emphasis added).

Amici submit this brief to show that petitioner's argument cannot be squared with the Securities Act, as the Second Circuit recognized in the decision below and in *Police and Fire Retirement System of the City of Detroit* v. *IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013), *cert. dismissed*, 135 S. Ct. 42 (2014). Moreover, allowing such tolling would have adverse consequences for both participants in the capital markets and the judicial system.

INTRODUCTION AND SUMMARY OF ARGUMENT

In Section 13 of the Securities Act, Congress enacted a "3-year limit [a]s a period of repose inconsistent with tolling" (*Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 363 (1991)), which operates as an "unqualified bar on actions instituted [3] years after" the triggering event. *Merck & Co.* v. *Reynolds*, 559 U.S. 633, 650 (2010). Petitioner asks the Court to override that legislative decision by holding that, under *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), the mere filing of a class action automatically tolls Section 13's statute of repose.

But *American Pipe* tolling is only available if it is "consonant with the legislative scheme." 414 U.S. at 558. Tolling is precluded where, as here, Congress has made the "legislative judgment" to create an "absolute bar ... on a defendant's temporal liability." *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175, 2183 (2014) (citation omitted; alteration original).

Congress specifically and affirmatively crafted Section 13 to balance the rights of plaintiffs with those of defendants. Reacting to concerns that open-ended liability would drive away qualified corporate board members, Congress chose a two-tiered structure with (as amended) a one-year statute of limitations coupled with a three-year statute of repose. The initial, shorter period may be subject to tolling; the longer period, however, serves as an outer limit on the filing of certain Securities Act suits and cannot be adjusted by the Judiciary. Petitioner's invocation of *American Pipe* tolling cannot be reconciled with the text, structure, or history of Section 13.

Nor can tolling be justified on policy grounds. Petitioner and its *amici* predict a deluge of protective filings under the plain language of the statute. Yet, tellingly, they cite no evidence of such an occurrence in the almost four years since the Second Circuit confirmed that Section 13 means what it says. *See Police and Fire Ret. Sys. of the City of Detroit* v. *IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013). Petitioner's rule would only benefit large institutional investors—the overwhelming majority of class members that opt-out, and the ones least burdened by having to make a simple court filing within three years to protect their own rights. At the same time, petitioner's rule would harm most individual investors, who would end up subsidizing the disproportionally larger settlements with opt-out plaintiffs at the cost of their own recovery. It would also hamper capital formation by injecting unneeded uncertainty regarding potential liability for past offerings, and violate defendants' statutory right of repose.

ARGUMENT

I. THE ABSOLUTE TIME LIMITATION IN SECTION 13 CANNOT BE TOLLED.

Petitioner's entire submission rests on the premise that it is "an established feature of federal civil procedure" that tolling under *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), applies to all "limitations periods," regardless of whether Congress created a "statute of limitation or a statute of repose," and regardless of the rest of the statutory scheme at issue. Br. 15 (capitalization omitted). That premise, however, is false; and as a result petitioner's conclusion—that *American Pipe* tolling applies to Section 13's statute of repose—does not follow.

A. Tolling Must Be "Consonant With The Legislative Scheme."

American Pipe itself explained that "tolling the limitation in a given context" may be allowed only if it is "consonant with the legislative scheme." 414 U.S. at 558; *see also id.* at 559 (concluding courts can "hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose").

As the Court has since explained, it is a matter of "hornbook law" that tolling is unavailable if it is "'inconsistent with the text of the relevant statute.'" *Young* v. *United States*, 535 U.S. 43, 49 (2002) (quoting *United States* v. *Beggerly*, 524 U.S. 38, 48 (1998)); *ibid.* (citing *American Pipe*, 414 U.S. at 558-59). Indeed, the Court has made this point over and over again since *American Pipe* was decided. *See, e.g.*, *Johnson* v. *Ry. Exp. Agency, Inc.*, 421 U.S. 454, 466 (1975) (*American Pipe* relied on "significant underlying federal policy" in the statute at issue); *Greyhound*

Corp. v. *Mount Hood Stages, Inc.*, 437 U.S. 322, 338 n.* (1978) (Burger, C.J., concurring) (explaining that tolling was "particularly appropriate" in *American Pipe* because "the addition of a federal limitations period in the [Clayton] Act was essentially a 'procedural' change in the statute" (quoting *American Pipe*, 414 U.S. at 558 n.29)); *Chardon* v. *Fumero Soto*, 462 U.S. 650, 660-61 (1983) ("In *American Pipe* ... a particular federal statute provided the basis for deciding that the tolling had the effect of suspending the limitations period" in that law).

When Congress chooses to enact a statute of repose rather than a mere statute of limitations, the "legislative purpose" is clear (414 U.S. at 559), and the deadline "may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff's control." *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175, 2183 (2014). This rule enforces a "legislative judgment" to create an "absolute ... bar on a defendant's temporal liability." *Ibid.* (citation omitted). Unlike a statute of limitations, such a "repose period is fixed and its expiration will not be delayed by estoppel or tolling." *CTS*, 134 S. Ct. at 2187 (citation omitted). That is because, as the Court reiterated earlier this Term, "courts are not at liberty to jettison Congress' judgment on the timeliness of suit." *SCA Hygiene Prods. Aktiebolag* v. *First Quality Baby Prods., LLC*, No. 15-927, 2017 WL 1050978, at *5 (U.S. Mar. 21, 2017) (citation omitted).

B. Section 13 Is "Inconsistent With Tolling."

With respect to Section 13 of the Securities Act, this Court has categorically answered the question whether tolling "is consonant with the legislative scheme." *American Pipe*, 414 U.S. at 558. After considering how "Congress ... balanced the policy considerations implicit in [the] limitations provision," the

Court decisively concluded that "[t]he 3-year limit is a period of repose inconsistent with tolling." *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 359, 363 (1991); *see id.* at 363 ("Because the purpose of the 3-year limitation is clearly to serve as a cutoff, we hold that tolling principles do not apply to that period"). This conclusion flows from both the structure and history of the statute.

1. The absolute nature of the three-year bar is clear from the two-tiered structure of the Securities Act's time-bar provision. It provides that an action must be "brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence," and then continues to provide that "*[i]n no event* shall any such action be brought to enforce a liability ... more than three years after the security" was offered or sold. 15 U.S.C. § 77m (emphasis added).

As the Court has repeatedly held, this formulation creates an "unqualified bar on actions instituted [three] years after" the triggering event, and "giv[es] defendants total repose after [three] years." *Merck & Co.* v. *Reynolds*, 559 U.S. 633, 650 (2010) (citing analysis of the "comparable bar" in *Lampf*). Tolling beyond the outer limit is "fundamentally inconsistent" with the two-tiered structure because Congress has built in a (circumscribed) period of tolling by means of the inner limit. *Lampf*, 501 U.S. at 363. In that context, the "purpose of the 3-year limitation is clearly to serve as a cut-off." *Ibid.*

2. Congress's intent to create an "unqualified bar" is amply evidenced in the rich statutory and legislative history of Section 13—which bears no resem-

blance to the "scant legislative history ... on the limitation and tolling provisions" at issue in *American Pipe*. 414 U.S. at 558 n.29. (All of the materials cited herein are reproduced in Federal Bar Association Securities Law Committee, *Federal Securities Laws: Legislative History 1933-1982*.)

In 1933 and 1934, Congress went from an initial proposal with no limitations period at all, to enacting a two-tiered structure with a bar of two years after discovery and ten years overall, to the present scheme: one year after discovery, and "in no event ... more than three years" after the sale or offer.

Time and again, courts, practitioners, the Department of Justice, and the SEC have examined this "remarkably complete and helpful" material (*Anixter* v. *Home-Stake Prod. Co.*, 939 F.2d 1420, 1434 n.20 (10th Cir. 1991), *vacated on other grounds by Dennler* v. *Trippet*, 503 U.S. 978 (1992)), and found it "pellucid that ... the three-year rule was to be absolute." *Norris* v. *Wirtz*, 818 F.2d 1329, 1332 (7th Cir. 1987) (Easterbrook, J.), *overruled on other grounds by Short* v. *Belleville Shoe Mfg. Co.*, 908 F.2d 1385 (7th Cir. 1990).

When the Securities Act was first proposed, it contained no limitations periods at all. *See* H.R. 4314, 73d Cong. (Mar. 29, 1933); S. 875, 73d Cong. (Mar. 29, 1933). This provoked immediate concern that, for example, responsible directors would resign *en masse* rather than face open-ended personal liability (*Securities Act: Hearings on S. 875 Before the S. Comm. on Banking and Currency*, 73d Cong. 120, 129, 205, 310 (1933)), and that an "unprincipled lawyer" would be able to bring suit based on events "10 or 20 years in the past." *Federal Securities Act: Hearings on H.R. 4314 Before the H. Comm. on Interstate and Foreign*

Commerce, 73d Cong. 169 (1933) (statement of William C. Breed). Among the commenters was the Investment Bankers Association of America (one of *amicus* SIFMA's forerunners) which proposed addressing these concerns by "limiting the time within which suits may be brought" to "within one year" of the offering. *Hearings on S. 875* at 339-40.

The Senate committee subsequently reported a bill with a five-year limit (S. 875 § 9, 73d Cong. (Apr. 17, 1933)), and the House committee a bill with a two-tiered limitation structure: two years from discovery, and "in no event" after ten years. H.R. 5480 § 13, 73d Cong. (May 5, 1933). The House version was enacted. Securities Act of 1933 § 13, ch. 38, 48 Stat. 74, 84.

This two-year/ten-year approach was the law for less than a year. When Congress passed the 1934 Exchange Act, it amended Section 13 to further restrict suits. This was one of several changes made in reaction to "criticisms and complaints" that the 1933 Act's provisions were "interfering with business." 78 Cong. Rec. 8668. The "greatest complaint[s]" were specifically about the 1933 Act's provisions on "the civil liability of underwriters and of offers and directors." *Id.* at 10,185. *See generally Report of the Special Committee on Amendments to the Securities Act of 1933, in Report of the 57th Annual Meeting of the Am. Bar Ass'n* 565, 568 (1934) ("[W]e believe the Act is a definite brake on [economic] recovery").

Based on this feedback, Congress concluded the original 10-year outer limit was so long it would "deter men from serving on boards of directors," because a director "might die and his estate would be liable possibly 8 years after his death to a suit brought by an individual." 78 Cong. Rec. 8200. To "give greater assurance to the honest officials of a corporation" and

reduce the risk "that a director would be uncertain as to the settlement of his estate," it shortened the "ultimate period of limitation [to] bring suit" to three years. *Ibid.*

The decision to continue the two-tiered structure in the 1934 amendments was also specifically—and hotly—debated. Congress explicitly rejected a proposal to replace the original structure with a single limit running from the date of misrepresentation or omission. 78 Cong. Rec. 8198. Senator Barkley, a conferee for the 1934 Act, directly addressed a colleague's preference for a single limit based on the concern that a two-tiered structure "will lead to a great deal of difficulty and a great deal of uncertainty." *Ibid.* He carefully explained that a plaintiff "is required to bring suit within one year of ... discover[ing] fraud," but that a "lapse of [three] years ... bars him from bringing suit at all [even] where he has made the discovery." *Ibid.* That marked an "ultimate period of limitation [in which to] bring suit." *Id.* at 8200. This view carried the day and the objection was withdrawn. *Ibid.*

The record also shows Congress consciously decided that the two-tiered structure was "just and fair to both sides." 78 Cong. Rec. 8200 (statement of Sen. Byrnes, another of the conferees). On the one hand, Congress retained the discovery based rule in order "to preserve the right of a man who might not discover the falsity of a statement" before a one-year absolute deadline. *Ibid.* But as Senator Fletcher (the sponsor of the amendments) further explained, the outer limit addressed Congress's belief that "the person who made the misrepresentation or false statement ought to feel safe at some reasonable time that he will not be disturbed." *Id.* at 8198. Throughout this "extensive

debate," "there was no mention of 'tolling'" of any kind. Harold S. Bloomenthal, *Statutes of Limitations & the Securities Acts—Part I*, 7 Sec. & Fed. Corp. L. Rep. 17, 21 (1985).

Shortly thereafter, the Senate passed Senator Fletcher's amendments, continuing the two-tiered structure from the 1933 Act but halving the existing periods to one year from discovery and an absolute bar at five years. H.R. Rep. 73-1838 at 36 (Conf. Rep.) (1934). For its part, the House chose a single three-year limitation. *Ibid.* In conference, Congress settled on the Senate's (and 1933 Act's) two-tiered structure, but borrowed the House's three-year preference as the newly lowered absolute limit. *Ibid.*; *see* Securities Exchange Act of 1934 § 207, ch. 404, 48 Stat. 881, 908.

Petitioner makes only passing reference to this extensive history in arguing that the three-year period is a "statute of limitations" rather than a "statute of repose." Br. 45 n.8. But, as it concedes one page earlier (Br. 44), those terms were often used interchangeably until recently. The dispositive inquiry is whether tolling is "not inconsistent with the legislative purpose," without regard to the term used at the time. *American Pipe*, 414 U.S. at 559. The very colloquy between Senators Barkley and Norris that petitioner cites answers this question here: Congress intended a complete bar. Senator Barkley explained that the three-year deadline marked an "ultimate period of limitation [in which to] bring suit," separate and apart from the one-year clock starting on discovery. 78 Cong. Rec. 8200; *see also id.* at 8198 ("the lapse of [three] years bars him from bringing suit at all"). Satisfied with this answer to his concern, Senator Norris responded: "[T]here is no misunderstanding as to

what it means. I agree to all that." *Id.* at 8198. Petitioner conveniently omits this part of the exchange.

Consistent with this Court's holdings in *CTS*, *Lampf*, and *Merck*, the Department of Justice and the SEC have also examined the statute and its history—and rejected petitioner's theory. The Solicitor General argued in *Credit Suisse* that the "two-part structure" in certain Securities Act provisions signals Congressional intent to create an "absolute period of repose." U.S. *Amicus* Br. 26, *Credit Suisse Sec. (USA) LLC* v. *Simmonds*, 566 U.S. 221 (2012) (No. 10-1261), 2011 WL 3780721. In the words of the SEC, "the outside period of repose in the 1933 and 1934 Act periods reflects a general congressional policy against tolling of securities claims." SEC *Amicus* Br. 28, *Lampf*, 501 U.S. 350 (No. 90-333), 1990 WL 10012716; *see also* SEC *Amicus* Br. 27 n.15, *Ceres Partners* v. *Gel Assocs.*, 918 F.2d 349 (2d Cir. 1990) (No. 89-7666), 1989 WL 1137586 ("Congress intended" Section 13's three-year deadline to be "absolute in order to ensure repose").

Commentators agree. For example, according to an ABA analysis, "[t]he express limitations periods provided by both the 1933 and 1934 Acts all contain an absolute cutoff." James W. Beasley, Jr., *ABA Report of the Task Force on Statute of Limitations for Implied Actions by the Committee on Federal Regulation of Securities*, 41 Bus. Law. 645, 655 (1986); *see also* Harold S. Bloomenthal, *Statutes of Limitations & the Securities Acts—Part I*, 7 Sec. & Fed. Corp. L. Rep. 17, 21 (1985) (after "extensive debate ... all the participants ... agreed that the limitation period was an absolute period").

Petitioner disclaims (Br. 50 n.11) the argument "that Congress could not enact a time-limitations pe-

riod extinguishing a defendant's liability," arguing instead that Congress has not done so *here*. But the "remarkably complete and helpful" record (*Anixter*, 939 F.2d at 1434 n.20) is "pellucid." *Norris*, 818 F.2d at 1332. "[T]he purpose of the 3-year limitation is clearly to serve as a cutoff." *Lampf*, 501 U.S. at 363.

II. PETITIONER'S POLICY ARGUMENTS ARE UNAVAILING.

Petitioner and its *amici* argue that the Second Circuit's rule will compromise investors' due process rights (Br. 25-29, 49) and create a "logistical and risk management nightmare for courts and defendants." Br. 22. Neither of these contentions holds up under scrutiny.

There has been no flood of "premature" opt-outs burdening the courts since the Second Circuit announced in *IndyMac* that Section 13 means what it says. Br. 9. In truth, it is petitioner's preferred rule—indefinite tolling—that would put a greater burden on the court system, and that would harm most participants in the securities markets.

Further, there is no violation of investors' due process rights in requiring a minimal level of effort to protect one's claims before a three-year deadline expires. To the contrary, it is *defendants'* right to "total repose after [three] years" that would be jeopardized. *Merck*, 559 U.S. at 650; *see also CTS*, 134 S. Ct. at 2175 (statute of repose reflects a "legislative judgment" to create an "absolute ... bar on a defendant's temporal liability" (citation omitted)).

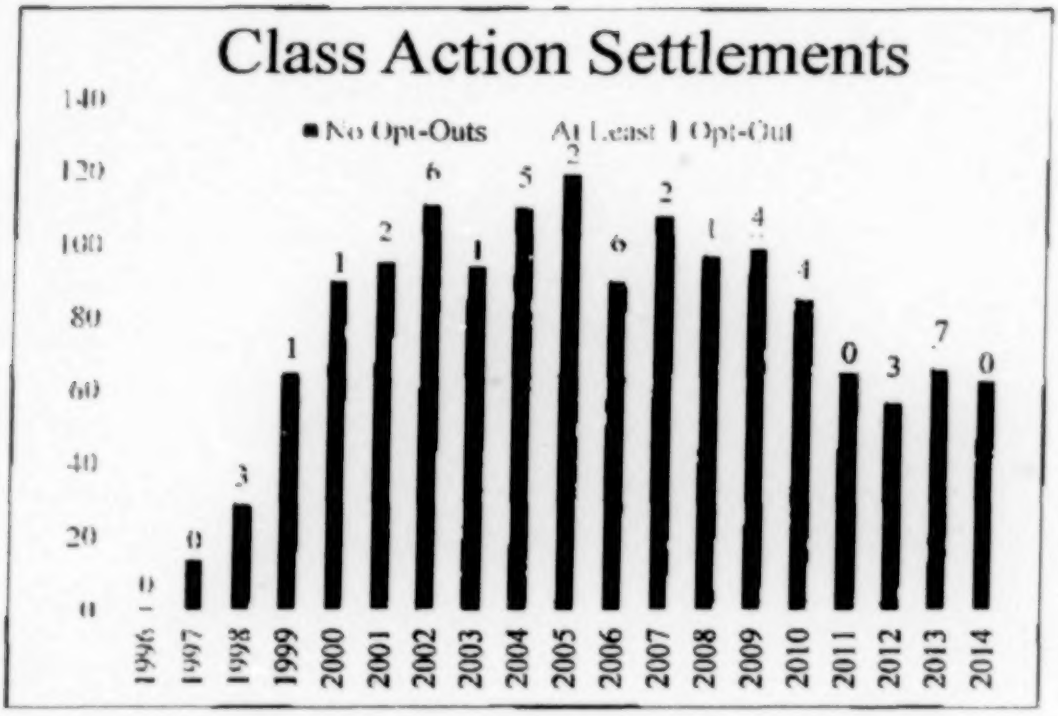
A. Protective Filings Are Not A Problem.

Petitioner and its *amici* predict that upholding the Second Circuit's rule will cause an avalanche of

"premature opt-outs from class procedures that will impose massive costs on defendants and the courts alike." Br. 9; *see, e.g.*, Retired Fed. Judges *Amicus* Br. 9; N. Am. Sec. Adm'rs Ass'n Inc. *Amicus* Br. 13. That is exactly what the petitioner and its supporters argued three years ago in *IndyMac*. *See, e.g.*, L.A. Cty. Emps. Ret. Ass'n and Gen. Ret. Sys. of the City of Detroit Br. 21-22, *Pub. Emps. Ret. Sys. of Miss.* v. *IndyMac MBS, Inc.* (No. 13-640) (claiming "courts will likely be inundated"); Reply Br. 11-12, *IndyMac* (similar).

But it has been almost four years since the Second Circuit announced in *IndyMac* that Section 13 will be enforced as enacted, yet there is no evidence whatsoever of the foretold "logistical and risk management nightmare for courts and defendants." Br. 22. Given the large number of securities suits brought in the Second Circuit, this is proof positive that the parade of horribles predicted by petitioner and its *amici* is a figment of their collective imagination.

Indeed, quite to the contrary of these dire predictions, the most recent annual data available shows that there were zero opt-outs from the 63 securities class actions that settled in 2014, and "no discernable increase ... over time." Cornerstone Research, *Opt-Out Cases in Securities Class Action Settlements: 2012-2014 Update* 2 (2016) (*Opt-Out Update*).



Source: Cornerstone Research, *Opt-Out Cases in Securities Class Action Settlements: 2012-2014 Update* 2 (2016)

Petitioner, its *amici*, and their counsel represent some of the most prolific class-action plaintiffs and law firms in the country, with knowledge of or involvement in virtually every securities case of consequence. And as the challengers to the status quo, they bear the burden of demonstrating the supposed flaws in the *IndyMac* rule. Yet they have only identified a *single* anecdotal example of the presaged avalanche of filings: the Petrobras securities litigation, which involves a grand total of 27 opt-outs, each an institutional investor "with sizable holdings in Petrobras securities." *In re Petrobras Sec. Litig.*, 193 F. Supp. 3d 313, 317 (S.D.N.Y. 2016); *see* Br. 24; Institutional Investors *Amicus* Br. 16; States *Amicus* Br. 13. And they ignore that the district court in that case has proved equal to the task before it, issuing a comprehensive order coordinating pre-trial proceedings (Order, No. 1:14-cv-

9662 (S.D.N.Y. Aug. 3, 2015), ECF No. 195), scheduling a "joint trial of the [class] action and the individual actions" (*In re Petrobras Sec. Litig.*, 312 F.R.D. 354, 359 (S.D.N.Y. 2016)), and staying subsequently filed individual actions pending the outcome of that trial. Order, No. 1:14-cv-9662 (S.D.N.Y. Nov. 19, 2015), ECF No. 315.

One case with a few opt-outs in the last three-plus years is not a "nightmare." Br. 22. The problem petitioner and its *amici* portend simply does not exist in the real world.

In all events, and as demonstrated by *Petrobras*, the courts have a myriad of well-developed techniques to efficiently handle any influx of opt-outs caused by enforcing Section 13's statute of repose.

Motions to intervene impose minimal burdens on courts. This is clear from the Administrative Office of U.S. Courts's periodic reports on motions pending for longer than six months. The most recent report listed 5,003 such motions, 10 (0.2%) of which were motions to intervene. *March 2016 Civil Justice Reform Act Report* 2 & tbl. 8, http://www.uscourts.gov/statistics-reports/march-2016-civil-justice-reform-act.

Nor is the initial intake of an entirely new civil case particularly burdensome. That happens almost 300,000 times a year. *See* Chief Justice John G. Roberts, Jr., *2016 Year-End Report on the Federal Judiciary* 12.

Once a complaint is filed, a court has an arsenal of tools at its disposal to minimize the resulting burden, be it of separate cases or additional parties in an existing case. Most obviously, the court can stay the new case pending further progress in the class action,

pursuant to its inherent power to "control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis* v. *N. Am. Co.*, 299 U.S. 248, 254 (1936); *see, e.g.*, *Bargas* v. *Rite Aid Corp.*, No. 2:13-cv-03865, 2014 WL 12538151, at *1 (C.D. Cal. Oct. 21, 2014) (staying "all the related single plaintiff cases until a class certification decision has been issued in related case"). Similarly, parties can postpone initial disclosures (*Manual for Complex Litigation (Fourth)* § 40.21) or stay counterclaims (*id.* § 40.53).

Should new plaintiffs wish to actively litigate instead (despite petitioner's assertion that they won't want to do anything at all), the court system is up to the task. *Petrobras*—petitioner's *worst-case* example—proves the point. There, Judge Rakoff consolidated pre-trial proceedings, ordered a joint trial of 28 cases (including 27 opt-outs), and stayed late-filed individual actions. That case also demonstrates how any potential burden is reduced by the "heav[y] concentrat[ion]" of securities cases in a single venue—the Southern District of New York—and the resulting expertise of its judges. Lex Machina, *Securities Litigation Report 2017* at 5. One quarter of all securities cases from 2009 through 2016 were filed there, and its bench includes 13 of the 15 judges handling the most securities cases nationwide. *Ibid.*; *see also* Stanford Law School, *Securities Class Action Clearinghouse*, http://securities.stanford.edu/filings.html (showing 1188 of 4424 securities class actions since 1995 were in S.D.N.Y.) (last visited Mar. 28, 2017). No other district comes close. *See also S.D.N.Y. Pilot Project Regarding Case Management Techniques for Complex Civil Cases* (2014), http://www.nysd.uscourts.gov/rules/Complex_Civil_Rules_Pilot_14.11.14.pdf (offering additional strategies).

Further, parties can agree to adopt, rather than re-brief, arguments across cases. *See, e.g.*, Stipulation and Order, *Wolf Opportunity Fund Ltd.* v. *McKinnell*, No. 1:12-cv-08379 (S.D.N.Y. Jan. 16, 2014), ECF No. 26. Similarly, discovery can be coordinated, staged, and shared across cases to avoid duplication. *Manual for Complex Litigation (Fourth)* § 11.455. Cases can even be coordinated across multiple districts (*id.* § 20.14), and the Judicial Panel on Multidistrict Litigation transfer process is available should there be a truly large number of cases scattered across districts. *Id.* § 20.13.

Not only do these tools alleviate any judicial burden from "premature" opt-outs—they actually reduce the overall burden by ensuring coordination across all cases from the outset.

B. Repose Serves The Interests Of All Participants In The Securities Markets.

1. Petitioner overreaches in complaining that applying Section 13 as written violates the "substantive due process right to opt out of the class action and supervise its own claims" (Br. 49) because "[m]any class members will not even be aware of the lawsuit from which they must opt-out until they receive the class notice after the three-year period has already expired." Br. 27. In fact, as explained below, there is no such notice issue in most private securities litigation, and the "right" being claimed does not exist. Moreover, what petitioner wants runs directly counter to Congress's intent in enacting the Private Securities Litigation Reform Act of 1995 (PSLRA).

a. As a preliminary matter, petitioner overstates the demands of due process. As the court below correctly explained, "[t]he due process protections of Rule

23 are directed at preventing a putative class member from being bound by a judgment without her consent." Pet. App. 5a. They stem from the requirement of "personal jurisdiction over the absent plaintiffs and their claims against petitioner" before a ruling can "bind [those] absent plaintiff[s]." *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 811-12, 814 (1985). That requirement is satisfied by Rule 23(b)(3), which ensures the right to opt-out of a proposed settlement, but which "does not confer extra benefits to [any] independent action." Pet. App. 5a.

Moreover, notice (Br. 27) is a non-issue in many securities class actions because the Private Securities Litigation Reform Act requires the first filer to provide "[e]arly notice to class members" within 20 days of filing the complaint. 15 U.S.C. § 77z–1(a)(3)(A)(i). Institutional plaintiffs like petitioner have another layer of protection in the free monitoring services plaintiff-side law firms routinely offer. *See, e.g.*, Judge Jed S. Rakoff, Confidential Informants and Securities Class Actions: Mixed Messages and Motives, Remarks Before the Third Annual Institute for Investor Protection Conference (Oct. 25, 2013), *in* 45 Loyola U. Chic. L.J. 571, 572 (2014); Michael J. Kaufman & John M. Wunderlich, *The Bromberg Balance: Proper Portfolio-Monitoring Agreements in Securities Class Actions*, 68 S. Methodist Univ. L. Rev. 771, 773 (2015).

From that point, a putative class member must expend only minimal effort to ensure it can later pursue individual action. Whether filed as a proposed complaint-in-intervention or as a stand-alone lawsuit, the pleadings are typically "materially the same" as one another and the complaint already filed by the named plaintiff(s). *See, e.g., In re Citigroup Inc. Sec.*

Litig., 987 F. Supp. 2d 377, 387 (S.D.N.Y. 2013) (describing "approximately 200" such filings). Even those filed by institutional investors may simply "rehash" prior pleadings. Julie Triedman, *Heavy-Hitters Hit Pfizer with New Securities Suit, Highlighting Opt-Out Trend*, Am. Law. (Nov. 15, 2012), http://www.litigationdaily.com/id=1202578543315. Requiring a litigant to take this simple step within three years does not ask much.

Nor is the opt-out right a "nullity" (Br. 27) even if the federal statute of repose has run, contrary to petitioner's protestations. A plaintiff opting out at that stage is still free to pursue other unexpired state law or federal claims without any fear of issue or claim preclusion from the class action. *See, e.g.*, 28 U.S.C. § 1658 (four- and five-year deadlines for certain claims under Sarbanes-Oxley); Joseph C. Long, 12A *Blue Sky Law* § 9:118.40 (Nov. 2016) (surveying state statutes of limitation and repose).

b. Real-world experience also demonstrates opt-out plaintiffs are overwhelmingly pension funds and other institutional investors like petitioner. *Opt-Out Update* 6. Indeed, one of petitioner's *amici* expressly concedes that "[i]t is generally not economical or practical for retail investors to opt-out of a potential settlement and seek their own remedies." N. Am. Sec. Adm'rs Ass'n Inc. *Amicus* Br. 11. There is simply no support for the conjecture that "many" opt-outs are "likely to be *pro se*" individual investors. Retired Fed. Judges *Amicus* Br. 17. And these institutional investors—the ones likely to opt-out—are all more than able to take these minimal steps. They are highly sophisticated litigants with large in-house legal teams, stables of outside counsel, and their own trade associ-

ation. *See, e.g.*, June D. Bell, *In-House Counsel Profile: California Public Employees' Retirement System's Matthew Jacobs*, Nat'l L.J. (Mar. 30, 2015) (describing CalPERS's team of more than 30 in-house attorneys and a cadre of outside litigation firms); Council of Institutional Investors, *About Us*, http://www.cii.org/about_us (last accessed Mar. 31, 2017).

In other words, these institutions are exactly the litigants Congress wants to control the litigation, not to opportunistically pace on the sidelines. In PSLRA, Congress enacted the "innovat[ive]" lead-plaintiff provision specifically "to increase the likelihood that institutional investors—parties more likely to balance the interests of the class with the long-term interests of the company—would serve as lead plaintiff." *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 320-21 (2007). Abrogating Section 13's statute of repose would run directly counter to this Congressional goal by incentivizing these same investors to *not* appear in court until a settlement is on the table.

Making matters worse, opt-outs are rarely actually seeking to "have [their] own day in court." Br. 25; *see also Opt-Out Update* 2 (explaining the goal is not "to bring their own lawsuit"). Rather, as the Southern District of New York presciently observed, "it is not uncommon for large institutions to opt-out of class actions simply so that they can improve their bargaining position if, as usually occurs, settlement discussions begin." *In re Petrobras Sec. Litig.*, 312 F.R.D. at 362. In doing so, they are actively undermining the class-action process.

2. At the same time, petitioner's request that this Court rewrite the statute would plainly violate defendants' statutorily guaranteed right of repose, as

well as impede capital formation by introducing uncertainty about open-ended liability into every offering. Moreover, it would increase the likelihood that non-institutional investors will be second-class citizens when it comes to settlement. Petitioner's preferred approach also has the potential to derail settlements entirely, burdening the courts and the remaining litigants with an expensive trial.

a. Congress specifically and deliberately created an "ultimate" (78 Cong. Rec. 8200) and "absolute ... bar" on bringing suit after three years. *CTS*, 134 S. Ct. at 2175. It is a "period of repose inconsistent with tolling" of any sort. *Lampf*, 501 U.S. at 363. Allowing new claims to be "brought" after three years directly and unavoidably violates that substantive, statutory right. Moreover, notwithstanding petitioner's grammatical acrobatics (Br. 31-38), any individual claim is "brought" with the filing of an opt-out complaint. *See, e.g., Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 350 (1983) ("There are many reasons why a class member ... might prefer to *bring an individual suit* rather than intervene" (emphasis added)). Until that time, putative class members are not parties, nor are they in privity with the parties. In fact the entire point of the exercise is to separate from the original action.

Petitioner and its *amici* argue that the purposes of a statute of repose are satisfied by the filing of the class action alone, so it matters not if they file their own suit years after the statutory deadline. Br. 33-34, 40-42; Directors *Amicus* Br. 8-9; SRM *Amicus* Br. 16. They are incorrect.

As petitioner acknowledges, it is an essential predicate to any tolling of individual claims that defendants have "the essential information necessary to

determine ... the ... size of the prospective litigation." Br. 33 (quoting *American Pipe*, 414 U.S. at 554-55). Allowing late opt-outs in securities suits runs directly counter to that requirement because of the well-established fact that "[w]hen institutional investors exit the class ... they appear to do dramatically better—by an order of magnitude" in per-share recoveries. John C. Coffee, Jr., *Accountability and Competition in Securities Class Actions: Why "Exit" Works Better Than "Voice,"* 30 Cardozo L. Rev. 407, 417 (2008). Indeed, their entire purpose in opting out is usually "improv[ing] their bargaining position[s]" for settlement. *In re Petrobras Sec. Litig.*, 312 F.R.D. at 362. For example, petitioner boasted in a prior case that it recovered "approximately 17 times what [it] would have recovered if [it had] stayed in the class action." Gilbert Chan, *CalPERS' Time Strategy Pays Off: The State Pension Fund Gets $117.7 Million After Opting Out of Class-Action Suit Against Media Giant*, Sacramento Bee (Mar. 15, 2007). In fact, institutional opt-outs on occasion recover more than the entire class. *See* Joshua H. Vinik et al., *Why Institutional Investors Are Opting Out of Class-Action Litigation*, Pensions & Invs. (July 25, 2011).

Thus defendants cannot know the "size of the prospective litigation" (414 U.S. at 555) without knowing the identity of opt-outs and the general magnitude of their claims. And that requires individual complaints for two reasons.

First, it is generally impossible for a defendant to reliably identify institutional plaintiffs and their holdings. The overwhelming majority of institutional shares are held by brokers or banks for objecting beneficial owners, meaning that by definition the identity of the shareholder and its stake is unknowable to the

issuer, let alone third-party defendants. Concept Release on the U.S. Proxy System, 75 Fed. Reg. 42,982, 42,999 & n.153 (July 22, 2010); *see also* 17 C.F.R. § 240.13d-1(a) (only requiring disclosure of beneficial owners controlling 5% of a class of securities, a very high threshold for most issuers); 15 U.S.C. § 78m(f) (Section 13 end-of-quarter disclosure by managers of more than $100 million of certain assets). In contrast, PSLRA specifically requires exactly this information in a complaint, opt-out or otherwise. *See* 15 U.S.C. § 78u–4(a)(2)(A)(iv).

Second, even if a defendant knew the identities of *potential* opt-outs (*i.e.* institutional plaintiffs), it would still be impossible to know which of them actually *would* opt-out. Virtually all opt-outs will be institutional investors, but not all institutional investors will opt-out. A significant number will not for any number of reasons—they may not want the publicity, they may prefer a non-antagonistic relationship with management, they may simply not think it worth the trouble. Randall S. Thomas & Harwell Wells, *James D. Cox: The Shareholders' Best Advocate*, 66 Duke L.J. 467, 494-95 (2016).

So until opt-outs have made themselves and their holdings known, defendants do not have "the essential information necessary to determine ... the ... size of the prospective litigation." Br. 33 (quoting *American Pipe*, 414 U.S. at 554-55). Until their complaints have been filed, there is no repose.

b. Repose is also vital to the smooth functioning of the capital markets. Without it, market participants will face the very real possibility of large exposure to opt-out suits years beyond Section 13's three-year cutoff. Such uncertainty is detrimental to capital formation and fluidity. Thus, at the least, offerers and

underwriters will be forced to reserve (or insure) against this increased risk and expend unnecessary resources on due diligence. As one prominent commentator explains, a "sizable portion of the underwriters' spread is a liability risk premium, and lawyer-disseminated fear of liability casts a harsh shadow over the due diligence process." Donald C. Langevoort, *Deconstructing Section 11: Public Offering Liability in a Continuous Disclosure Environment*, 63 L. & Contemp. Probs. 45, 45-46 (2000). Some deals with narrow profit margins will falter entirely due to increased costs, or be squashed by cautious boardrooms and attorneys worried about difficult-to-assess litigation exposure a decade out. *See* Amendments for Small and Additional Issues Exemptions Under the Securities Act (Regulation A), 80 Fed. Reg. 21,806, 21,871 (Apr. 20, 2015) (recognizing that compliance costs can make public offerings "too costly to be ... viable").

c. Allowing this opportunistic approach also encourages "two-tiered settlement[s], in which smaller shareholders are significantly disadvantaged" as defendants shift settlement funds to the large opt-out plaintiffs. Cornerstone Research, *Opt-Out Cases in Securities Class Action Settlements* 5 (2013) (*Opt-Out Cases*).

The economic reality is that a defendant will pay less for a settlement that leaves some claims unresolved. The amount reserved for those future claims correlates directly with the potential size of the remaining exposure.

In a Section 11 case, a settling defendant must approach this settlement calculus with two facts in mind: First, as petitioner's *amici* acknowledge, insti-

tutional plaintiffs comprise the overwhelming majority of opt-outs because individual retail investors rarely have enough at stake to make any individual action worthwhile. *See* N. Am. Sec. Adm'rs Ass'n Inc. *Amicus* Br. 11; *see also Opt-Out Cases* 5; *Opt-Out Update* 3. Second, opt-outs "do dramatically better—by an order of magnitude." John C. Coffee, Jr., *Accountability and Competition in Securities Class Actions: Why "Exit" Works Better Than "Voice,"* 30 Cardozo L. Rev. 407, 417 (2008). Those disproportionately large settlements for the opt-outs come at the expense of the per-share recovery by the retail "investors who most need the protection offered by the federal securities laws." Br. 25. Those class members are forced to "effectively subsidize opt-outs." Myriam Gilles & Gary B. Friedman, *Exploring the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. Pa. L. Rev. 103, 133 (2006).

In extreme cases, the same economic dynamics can result in the remainder of the class and the defendant being unable to reach a satisfactory settlement, and instead proceeding to an expensive trial. Relatedly, those forces pose the risk of triggering blow-up clauses, common provisions in "settlement agreement[s], which allo[w] the defendant to terminate the settlement if a predetermined number or proportion of the members of the class timely and validly" opt-out. 2 *McLaughlin on Class Actions* § 6:21 (13th ed.). That too creates an "increase[d] ... likelihood of trials." *Opt-Out Update* 5. The resulting burden of a complex class action securities trial on a district court and the litigants is considerable. *See, e.g.*, Martin Arnold & Ben McLannahan, *HSBC Settles One of a Long List of Legal Issues*, Fin. Times (June 17, 2016) (noting six-week trial in 2009).

* * * * *

Congress made the considered decision to provide a substantive right in Section 13—a complete cut-off on Section 11 suits after three years. Petitioner may take issue with the strength or applicability of the "legislative judgment[s]" reflected in Section 13 (*CTS*, 134 S. Ct. at 2179), but the proper audience for any such complaint is Congress, not the courts. The Judiciary's role is to enforce the statutorily mandated limit, not abrogate it as petitioner requests.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

KEVIN CARROLL
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
1101 New York Ave., NW
Washington, DC 20001

JEREMY R. NEWELL
PAIGE E. PIDANO
THE CLEARING HOUSE ASSOCIATION L.L.C.
1101 Pennsylvania Ave., NW
Suite 720 North Tower
Washington, DC 20004

MARK A. PERRY
Counsel of Record
DAVID A. SCHNITZER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., NW
Washington, DC 20036
(202) 955-8500
mperry@gibsondunn.com

Counsel for Amici Curiae

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CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM,

Petitioner,

v.

ANZ SECURITIES, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE SRM GLOBAL MASTER FUND LIMITED PARTNERSHIP IN SUPPORT OF PETITIONER

RICHARD B. DRUBEL
BOIES SCHILLER FLEXNER LLP
26 South Main Street
Hanover, NH 03755

PHILIP C. KOROLOGOS
BOIES SCHILLER FLEXNER LLP
575 Lexington Avenue, 7th Floor
New York, NY 10022

DAVID BOIES
Counsel of Record
BOIES SCHILLER FLEXNER LLP
333 Main Street
Armonk, NY 10504
(914) 749-8200
dboies@bsfllp.com

Counsel for Amicus Curiae

271468

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. *American Pipe* Tolling Does Not Violate the Rules Enabling Act Because It Regulates Procedure 6

II. *American Pipe* Tolling Is Necessary to Maintain the Integrity of Rule 23 and Has Only an Incidental Effect on the Federal Securities Laws 11

III. *American Pipe* Tolling is Consonant With the Legislative Scheme of Sections 13 and 1658(b)(2) and the Federal Securities Laws Generally 14

CONCLUSION 19

TABLE OF CITED AUTHORITIES

Page

Cases

American Pipe & Constr. Co. v. Utah,
414 U.S. 538 (1974) ..... *passim*

Burlington Northern R. Co. v. Woods,
480 U.S. 1 (1987) 7, 11, 12

Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.,
498 U.S. 533 (1991) 5, 11, 12, 13

Crown, Cork & Seal Co. v. Parker,
462 U.S. 345 (1983) 5, 10, 12, 13, 16

CTS Corp. v. Waldburger,
134 S. Ct. 2175 (2014) 16, 17

Hanna v. Plumer,
380 U.S. 460 (1965) 7

In re Cavanaugh,
306 F.3d 726 (9th Cir. 2002) 18

In re Lehman Bros. Sec. & ERISA Litig.,
655 F. App'x 13 (2d Cir. 2016) 4

Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning,
136 S. Ct. 1562 (2016) 15

Page

Mississippi Pub. Corp. v. Murphree,
326 U.S. 438 (1946) 11

Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc.,
721 F.3d 95 (2d Cir. 2013), *cert. granted sub nom. Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, 134 S. Ct. 1515 (2014), *cert. dismissed as improvidently granted*, 135 S. Ct. 42 (2014) ("*IndyMac*") ..... *passim*

Shady Grove Orthopedic Assocs., P.A. v. Allstate Insurance Co.,
559 U.S. 393 (2010) ..... *passim*

Sibbach v. Wilson & Co.,
312 U.S. 1 (1941) ..... *passim*

SRM Global Master Fund Ltd. P'ship v. Bear Stearns Cos.,
829 F.3d 173 (2d Cir. 2016) 2, 4

Statutes

15 U.S.C. § 15b 15

15 U.S.C. § 77m ("Section 13") ..... *passim*

15 U.S.C. § 78u-4(a)(3)(B) 18

Page

28 U.S.C. § 1658(b)(2) ..... *passim*

28 U.S.C. § 2072(b) 4

N.Y. C.P.L.R. § 901(b) 7, 8

Private Securities Litigation Reform Act, Pub. L. 104-67, 109 Stat. 737 (1995) 18

Rules

Fed. R. Civ. P. 3 10

Fed. R. Civ. P. 23 ..... *passim*

Fed. R. Civ. P. 35 7

Fed. R. Civ. P. 37 7

Other Authorities

Black's Law Dictionary (3d ed. 1933) 15

Corman, *Limitations of Actions* § 1.3.2.1 (1991) 3

19 Wright & Miller, *Fed. Prac. & Proc. Juris.* § 4509 (2d ed.) 11

INTEREST OF AMICUS CURIAE[1]

Amicus curiae SRM Global Master Fund Limited Partnership is a private investment fund that invests in a variety of asset classes on behalf of dozens of investors in the United States and around the world, including major international institutions and pension funds. As a major investor with a long-term investment outlook, amicus is concerned with the proper and efficient functioning of U.S. capital markets.

Like Petitioner, amicus has been harmed by the decision of the Court of Appeals for the Second Circuit in *Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013), *cert. granted sub nom. Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, 134 S. Ct. 1515 (2014), *cert. dismissed as improvidently granted*, 135 S. Ct. 42 (2014) ("*IndyMac*"). SRM had been an absent class member of a class action lawsuit against Bear Stearns, *Eastside Holdings Inc. v. Bear Stearns Cos.*, 08-cv-2739 (S.D.N.Y.), since that case was filed on March 17, 2008, years before the expiration of any applicable limitary periods. SRM timely opted out effective November 29, 2012 and filed an individual complaint asserting Section 10(b) claims less than five months later on April 24, 2013, four years and 214 days before expiration of the five-year limitary period under Section 1658(b)(2) under the tolling rule of *American*

1. Letters from the Petitioner and Respondents consenting generally to the filing of briefs by amici curiae are on file with the Court. No person other than amicus or its counsel authored this brief in whole or in part, and no person other than amicus and its counsel contributed any money toward the preparation or submission of this brief.

Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974). Two months later, the Court of Appeals decided *IndyMac*, holding that *American Pipe* tolling did not apply to the repose period in Section 13 of the Securities Act of 1933. 721 F.3d 95 at 101. In *SRM Global Master Fund Ltd. Partnership v. Bear Stearns Cos.*, 829 F.3d 173 (2d Cir. 2016), for which a petition for a writ certiorari remains pending before the Court, the Court of Appeals extended *IndyMac*'s holding to Section 1658(b)(2), the repose period governing SRM's Securities Exchange Act claims, and dismissed SRM's opt-out lawsuit as untimely. *Id.* at 177. The Court of Appeals' retroactive extension of *IndyMac* effectively eliminated SRM's post-certification opt-out right from a class settlement in which SRM would have received nothing notwithstanding the fact that it incurred more than $200 million in losses as a result of securities fraud by Bear Stearns. This deprived SRM of its day in court and its right to be compensated for its losses under the federal securities laws.

The *American Pipe* rule is a fundamental part of the procedural framework for litigating securities class actions. The Court of Appeals' decisions in this case, in *IndyMac*, and in amicus's own case have impaired the effective functioning of class action litigation and the rights of individual class members, including their right to opt out of a class action and pursue claims through individual actions. Amicus is concerned that, if the *American Pipe* rule were held to be inapplicable to the three-year repose period under Section 13 of the Securities Act, 15 U.S.C. § 77m, and comparable statutes including 28 U.S.C. § 1658(b)(2), amicus would be forced into wasteful and duplicative litigation as a protective measure whenever, as is often the case, a limitary period

approaches with no decision on class certification. The result would be additional costs for all involved, including defendants and the courts, with no compensating benefits to any of the interests Congress was trying to protect in enacting any statute of repose. Accordingly, amicus urges the Court to reverse.

SUMMARY OF ARGUMENT

This case presents a critical question regarding the application of this Court's tolling rule in *American Pipe* to the limitary periods contained in Section 13 of the Securities Act and Section 1658(b)(2) of Title 28, applicable to Securities Exchange Act claims.[2] *American Pipe* held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been

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2. Amicus assumes for the purposes of this brief that the three- and five-year limitary periods in Sections 13 and 1658(b)(2), respectively, are statutes of repose. Petitioner has capably argued in its own brief that Section 13 is a statute of limitations and is subject to *American Pipe* tolling on that basis. Similarly, it is amicus's position that nothing in the plain language of Section 1658(b) suggests that the five-year limitary period in Section 1658(b)(2) is less susceptible to *American Pipe* tolling than that the two-year statute of limitations in Section 1658(b)(1). *See Corman, Limitations of Actions* §1.3.2.1 at 30-31 (1991) (various definitions of statutes of repose include the following: (1) "it is merely one type of statute of limitation" that places a cap or outer limit on a statute; (2) "a statute of repose is considered distinct from a statute of limitation because it begins to run at a time unrelated to the traditional cause of action"). However, for the reasons explained herein, it is amicus's position that *American Pipe* tolling applies to all limitary periods regardless of whether they are labeled statutes of limitations or statues of repose.

permitted to continue as a class action." 414 U.S. at 554. As the Court stated, this rule is "consistent both with the procedures of Rule 23 and with the proper function of the limitations statute." 414 U.S. at 555. The Court's reasoning in *American Pipe* applies equally to repose periods like those in Section 13 and Section 1658(b)(2).

The Court of Appeals for the Second Circuit rejected this conclusion and determined that application of *American Pipe* tolling to statutes of repose would violate the Rules Enabling Act, 28 U.S.C. § 2072(b), by improperly allowing Rule 23 to abridge substantive rights created by a statute of repose. *See In re Lehman Bros. Sec. & ERISA Litig.*, 655 F. App'x 13, 15 (2d Cir. 2016); *SRM Global Master Fund*, 829 F.3d at 176-77 (same). The Court of Appeals based its holdings on its earlier determination in *IndyMac* that statutes of repose create a substantive right to be free from liability after a legislatively determined period of time. 721 F.3d at 106. According to the Court of Appeals, applying *American Pipe* tolling to permit the filing of a complaint after the repose period had run would "necessarily enlarge or modify a substantive right and violate the Rules Enabling Act." *Id.* at 109. However, this analysis is based upon an incorrect premise. For purposes of analyzing the Rules Enabling Act, it makes no difference whether statutes of repose create substantive rights. The Court of Appeals erred in at least three ways in concluding otherwise.

First, the Court of Appeals failed to analyze the applicability of *American Pipe* tolling to a statute of repose under the legal standard for the Rules Enabling Act set forth by this Court in *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941), and *Shady Grove Orthopedic Associates, P.A.*

v. Allstate Insurance Co., 559 U.S. 393 (2010) (plurality opinion). Under this standard, it simply "makes no difference" whether a statute of repose creates substantive rights. *Shady Grove*, 559 U.S. at 409. The only relevant question is whether Rule 23, as interpreted by *American Pipe*, "really regulates procedure," *Sibbach*, 312 U.S. at 14; *Shady Grove*, 559 U.S. at 411, which it plainly does. *American Pipe* supplies the definition for what it means for a case to be "brought" within the applicable limitary period. Accordingly, following *Sibbach* and *Shady Grove*, application of *American Pipe* tolling to statutes of repose such as those in Section 13 and Section 1658(b)(2) does not violate the Rules Enabling Act. The Court of Appeals did not address this issue.

Second, application of *American Pipe* tolling to the repose periods of Sections 13 and 1658(b)(2) would not violate the Rules Enabling Act because "Rules which *incidentally* affect litigants' substantive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules." *Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 552 (1991) (internal quotation omitted). This Court has repeatedly recognized that failure to apply *American Pipe* tolling "would deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure." *American Pipe*, 414 U.S. at 553; *accord Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 349-52 (1983). Since *American Pipe* tolling is consonant with the purposes of the repose periods in Sections 13 and 1658(b)(2) and does not enlarge a defendants' potential liability, its effect on any rights created by those statutes is, at most, incidental. The Court of Appeals did not address this issue.

Finally, *American Pipe* itself rejected the proposition that the Rules Enabling Act prohibits any application of a rule that might be said to affect substantive rights. 414 U.S. at 557-58. Under *American Pipe*, the question "is not whether a time limitation is 'substantive' or 'procedural,' but whether tolling the limitation in a given context is consonant with the legislative scheme." *Id.* In *IndyMac*, the Court of Appeals inexplicably misconstrued this standard as applying only where the relevant time limitation is "procedural." 721 F.3d at 109 n.17. Here, application of *American Pipe* to the repose periods in Sections 13 and 1658(b)(2) is fully consonant with the language and purpose of the limitary periods applicable to Securities Act and Exchange Act claims and to the federal securities laws generally. The Court of Appeals did not address this issue.

For all of these reasons, application of *American Pipe* tolling to the repose periods contained in Section 13 and Section 1658(b)(2) does not violate the Rules Enabling Act. This Court should reverse the Court of Appeals' contrary decision.

ARGUMENT

I. *American Pipe* Tolling Does Not Violate the Rules Enabling Act Because It Regulates Procedure.

For over seven decades, this Court has used a test with a single criterion to determine whether a Federal Rule violates the Rules Enabling Act: "The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and

redress for disregard or infraction of them." *Sibbach*, 312 U.S. at 14; *accord Hanna v. Plumer*, 380 U.S. 460, 464 (1965); *Burlington Northern R. Co. v. Woods*, 480 U.S. 1, 8 (1987).

In *Sibbach*, the Court rejected a challenge to the validity of Federal Rules of Civil Procedure 35 and 37. The district court ordered Mrs. Sibbach, a personal injury plaintiff, to submit to a physical examination under Rule 35, and it held her in contempt under Rule 37 when she refused. 312 U.S. at 4-5, 14-16. Mrs. Sibbach argued that although Rules 35 and 37 were nominally procedural, they violated the Rules Enabling Act because they abridged her substantive right to be free from physical invasion. *Id.* at 10-14. The Court rejected the Rules Enabling Act challenge, concluding that the procedural nature of Rules 35 and 37 was the deciding factor, not whether any substantive right had been abridged. *Id.* at 14. As the Court stated, "[t]he test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Id.*

Most recently in *Shady Grove,* Justice Scalia, writing for the plurality,[3] noted that "*Sibbach* has been settled

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3. *Shady Grove* involved a conflict between a federal rule (Fed. R. Civ. P. 23) and a state rule (N.Y. C.P.L.R. § 901(b)). This case is therefore easier than *Shady Grove* because it does not involve such a conflict. The federalism concerns that were largely responsible for dividing the Court in *Shady Grove* are not present here. *See Shady Grove*, 559 U.S. at 424-25 (Stevens, J., concurring in part and in the judgment, and observing that Justice Scalia "ignores the balance that Congress struck between uniform rules

law . . . for nearly seven decades" and that its "governing rule" focusing "on the Federal Rule as the proper unit of analysis[] is alive and well." 559 U.S. at 413 & n.12. In *Shady Grove*, a medical facility brought a federal class action against Allstate Insurance for statutory interest payments required under New York law because of Allstate's failure to make timely payments of claims. However, New York law, C.P.L.R. Section 901(b), also precluded a plaintiff from maintaining a class action seeking statutory penalties. *Id.* at 401. Allstate challenged the application of Rule 23 under the Rules Enabling Act, arguing that applying Rule 23 would abridge its right under New York law to be protected from class actions seeking recovery of statutory penalties. *Id.*

A majority of this Court rejected Allstate's argument, concluding that Rule 23 did not violate the Rules Enabling Act because Rule 23 "really regulates procedure." *Id.* at 410. The plurality explicitly reaffirmed and followed the *Sibbach* test: "*Sibbach* adopted and applied a rule with a single criterion: whether the Federal Rule really regulates procedure." *Shady Grove*, 559 U.S. at 411 (internal quotations omitted). As Justice Scalia explained:

> The test is not whether the rule affects a litigant's substantive rights; most procedural rules do. What matters is what the rule itself regulates: If it governs only the manner and the means by which the litigants' rights are enforced, it is valid; if it alters the rules of decision by which the court will adjudicate those rights, it is not.

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of federal procedure and respect for a State's construction of its own rights and remedies").

Id. at 407 (internal quotations, alterations, and citation omitted). The fact that an individual application of a Rule might affect a litigants' substantive rights "*makes no difference*" to the question of whether it is permitted under the Rules Enabling Act. *Id.* at 409.

Applying the *Sibbach* test, this Court has rejected every statutory challenge to a Federal Rule that has come before it. *Id.* (collecting cases). By focusing on the issue of whether a statute of repose confers a substantive right, the Court of Appeals, in this case, in amicus's own case, and in *IndyMac* on which both relied, simply ignored the only relevant criterion under *Sibbach*. The Court of Appeals' position was also flatly rejected by the plurality in *Shady Grove*. *Id.* at 411. It is not the substantive or procedural nature of the displaced law that matters, but the substantive or procedural nature of the Federal Rule: "We have held since *Sibbach*, and reaffirmed repeatedly, that the validity of a Federal Rule depends entirely upon whether it regulates procedure." *Id.* at 410. The Court of Appeals ignored this directive.

Following *Sibbach*, the application of *American Pipe* tolling to statutes of repose does not violate the Rules Enabling Act. For example, Section 13 of the Securities Act requires that a private right of action involving fraud in a registration statement be "brought" no later than (1) one year after the untrue statement or omission was discovered or should have been discovered or (2) three years after the security was offered to the public. 15 U.S.C. § 77m. Similarly, Section 1658(b)(2) requires that a private action for fraud under Section 10(b) be "brought" not later than the earlier of (1) two years after the discovery of the facts constituting the violation or (2) five years after such

violation. 28 U.S.C. § 1658(b)(2). Neither Section 13 nor Section 1658(b)(2), however, define what it means for an action to be "brought," which is a matter of procedure. *Cf.* Fed. R. Civ. P. 3 (action "commenced" by filing of complaint).

For a class action, Rule 23 as interpreted by *American Pipe* supplies the applicable standard: "the filing of a timely class action complaint commences the action for all members of the class as subsequently determined." *American Pipe*, 414 U.S. at 550. The commencement of a timely class action satisfies the "limitation provision as to all those who might subsequently participate in the suit as well as for the named plaintiffs." *Id.* at 551. Any requirement for "individualized satisfaction of the statute of limitations by each member of the class" was eliminated by adoption of Rule 23. *Id.* at 550. If class certification is denied or class members opt out, they can file a separate action "within the time that remains on the limitations period." *Crown, Cork*, 462 U.S. at 346-47.

American Pipe tolling governs the "manner and the means" by which class members' rights are enforced. *Shady Grove*, 559 U.S. at 407. It does not alter the rules of decision—Section 11 in Petitioner's case, and Section 10(b) in amicus's case—by which a court will adjudicate those rights. As such, it "really regulates procedure," *Sibbach*, 312 U.S. at 14, and therefore does not violate the Rules Enabling Act. This is true even if, as the Court of Appeals erroneously concluded, it affects a litigant's substantive rights, as "most procedural rules do." *Shady Grove*, 559 U.S. at 407. That simply "makes no difference" as to whether the Rules Enabling Act is violated. *Id.* at 409.

II. *American Pipe* Tolling Is Necessary to Maintain the Integrity of Rule 23 and Has Only an Incidental Effect on the Federal Securities Laws.

Even if the limitary periods in Sections 13 and 1658(b)(2) were held to create substantive rights under the Rules Enabling Act, any effects on those rights under *American Pipe* tolling are merely incidental and would accordingly not violate the Rules Enabling Act. In *Burlington Northern*, "the Court considered the Act's proscription against interference with substantive rights and held, in a unanimous decision, that 'Rules which *incidentally* affect litigants' substantive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules.'" *Bus. Guides*, 498 U.S. at 552 (quoting *Burlington Northern*, 480 U.S. at 5)); *and see* 19 Wright & Miller, *Fed. Prac. & Proc. Juris.* § 4509 (2d ed.) ("If incidental impingements on substantive rights were sufficient to render a Civil Rule inoperative, the very objective of the Enabling Act and the Rules themselves would be imperiled. . . . Whatever may be the appropriate construction of 'abridge, enlarge or modify,' presumably it must accommodate the goal of establishing a comprehensive system of procedure and allow for such impingements of substantive rights as are reasonably incidental to significant procedural objectives.").

Accordingly, this Court has consistently held that Federal Rules do not violate the Rules Enabling Act, even if they affect a party's rights, where such effects were "incidental." *See, e.g., Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 445-46 (1946) (although Rule 4(f) "undoubtedly" affected defendant's rights, "such incidental effects" "relate[] merely to 'the manner and the means by

which a right to recover is enforced'" (alterations omitted)); *Bus. Guides*, 498 U.S. at 548, 551-52 (Rule 11 sanctions did not violate the Rules Enabling Act because any "effect on substantive rights" to be free from sanctions except upon finding of bad faith was "incidental"); *Burlington Northern*, 480 U.S. at 4 (Fed. R. App. P. 38 discretionary penalties for frivolous appeals only incidentally affect appellee's right under Alabama statute to a mandatory ten percent penalty). Here, *American Pipe* merely regulates when an action is commenced, and as explained in Section III, *infra*, it does so in a manner that is fully consonant with the purposes of repose periods like those in Section 13 and Section 1658(b)(2). In addition, in both Petitioner's and amicus's cases, the individual claims were entirely encompassed by the indisputably timely operative class action complaints, so the defendants' potential liability was not enlarged. Therefore, the effect of *American Pipe* tolling on any rights created by Sections 13 and 1658(b)(2) in these cases is, at most, incidental. Focusing only on the "substantive" label applied to statutes of repose, the Court of Appeals erred by failing to consider these precedents.

American Pipe tolling is also "reasonably necessary to maintain the integrity" of Rule 23 class action procedure. *Burlington Northern*, 480 U.S. at 5. As this Court has explained, without *American Pipe* tolling, the "principal purposes of the class action procedure—promotion of efficiency and economy of litigation—would thereby be frustrated." *Crown, Cork*, 462 U.S. at 349. "[C]lass members would not be able to rely on the existence of the suit to protect their rights," *id.* at 350, as "Rule 23 both permits and encourages class members" to do, *id.* at 352, forcing them to intervene or take other action. "The result would be a needless multiplicity of actions—precisely the

situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid." *Id.* at 351. This rationale applies no less to the three- and five-year limitary periods contained in Sections 13 and 1658(b)(2) than it does to their one- and two-year limitary periods.

Finally, as this Court has recognized, *American Pipe* tolling is necessary in order to provide class members with a meaningful ability to opt out under Rule 23. Without *American Pipe* tolling, "a class member would be unable to press his claim separately if the limitations period had expired while the class action was pending." *Id.* (internal quotation omitted). This Court has "concluded that the right to opt out and press a separate claim remained meaningful because the filing of the class action tolled the statute of limitation under the rule of *American Pipe*." *Id.* at 351-52. Indeed, this is why the Court expressly extended *American Pipe* "to apply to class members," like Petitioner and amicus, "who choose to file separate suits." *Id.* at 352. This important purpose of *American Pipe* tolling applies regardless of whether statutes of limitation or statutes of repose are involved.

American Pipe tolling of the statutes of repose applicable to the federal securities laws is "reasonably necessary to maintain the integrity" of Rule 23 and only "incidentally" affects any rights afforded to a defendant under those laws. Respondents cannot overcome this "substantial hurdle[]." *Bus. Guides*, 498 U.S. at 552.

III. *American Pipe* Tolling is Consonant With the Legislative Scheme of Sections 13 and 1658(b)(2) and the Federal Securities Laws Generally.

American Pipe rejected the premise that the Rules Enabling Act prohibits any tolling of a limitary period that can be said to be "substantive." 414 U.S. at 557-58. According to *American Pipe*, the issue "is not whether a time limitation is 'substantive' or 'procedural,' but whether tolling the limitation in a given context is consonant with the legislative scheme." *Id.* The "mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose." *Id.* at 559. In *IndyMac*, the Court of Appeals concluded that this standard only applies where the given limitary period is procedural, so it refused to apply this precedent, having found that three-year limitary period in Section 13 was substantive. 721 F.3d at 109 n.17. But this conclusion is directly at odds with *American Pipe*, which plainly states that the substantive or procedural nature of the limitary period does not matter. 414 U.S. at 557-58.

Applied here, the question is whether *American Pipe* tolling of limitary periods in Sections 13 and 1658(b)(2) is consonant with the legislative scheme. If it is, then the application of *American Pipe* tolling invades no substantive right of a defendant but rather reflects that Congress never intended defendants to be free from liability to class members whose claims were timely filed under the rule. Applying this standard, *American Pipe* is entirely consonant with the limitations schemes underlying the Securities Act and the Securities Exchange Act.

Beginning with the statutory text, Section 13 requires that any Section 11 action "be brought" within three years after the security was offered to the public. 15 U.S.C. § 77m. Section 1658(b)(2) similarly provides that a fraud claim must "be brought" within five years of the violation. 28 U.S.C. § 1658(b)(2). "'Brought' in this context means 'commenced[.]'" *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1568 (2016) (quoting *Black's Law Dictionary* (3d ed. 1933)). And in *American Pipe*, this Court held that "a timely class action complaint commences the action for all members of the class as subsequently determined." 414 U.S. at 550. That interpretation of Section 13 and Section 1658(b)(2) is supported by the provision's use of the passive voice—"be brought"—which encompasses a representative bringing a suit on another's behalf. By refusing to address the question more specifically than that, Congress left it to the courts to decide how repose periods would apply to representative actions (including class actions). *American Pipe* took up that responsibility, answering the question by sensibly considering the rules governing, and purposes behind, class action litigation.

Furthermore, the text of Section 13 and Section 1658(b)(2) does not expressly extinguish or confer any rights, nor does it forbid tolling. Those statutes merely state when actions may be "brought." In fact, the language of these provisions is arguably less absolute than the Clayton Act's limitations provision at issue in *American Pipe*, which stated that an action "shall be forever barred" if not commenced in time. 15 U.S.C. § 15b. If that language did not extinguish rights, it is difficult to see why the language of Section 13 or Section 1658(b)(2) should do so.

Applying *American Pipe* to Section 13 and Section 1658(b)(2) is also consistent with the legislative purposes of the Securities Act and the Exchange Act and the limitary periods that apply to claims brought under them. "Limitations periods are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights, but these ends are met when a class action is commenced." *Crown, Cork*, 462 U.S. at 352 (citation omitted). Moreover,

> a class complaint "notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." The defendant will be aware of the need to preserve evidence and witnesses respecting the claims of all the members of the class.

Id. (quoting *American Pipe*, 414 U.S. at 555).

"Statutes of repose also encourage plaintiffs to bring actions in a timely manner, and for many of the same reasons." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014). In addition, statutes of repose "effect a legislative judgment that a defendant should be free from liability after the legislatively determined period of time." *Id.* (internal quotation omitted). *American Pipe* is entirely consonant with these purposes because it guarantees that after the limitations period has expired, no liability will be imposed beyond that claimed in lawsuits commenced on or before that date. Statutes of repose do not, after all, serve *different* policies than statutes of limitations—to the extent there is a legal difference, statutes of repose simply

permit fewer exceptions to those policies. *See id.* In fact, *CTS Corp.* identified only two differences between statutes of limitations and statutes of repose, and neither suggests *American Pipe* is any less consonant with the purpose of statutes of repose. *Id.* (observing that (1) statutes of limitations run from the accrual or discovery of a claim, and (2) statutes of limitation are subject to equitable tolling, whereas statutes of repose are not). *American Pipe* itself said that tolling limitations periods during the pendency of a class action "fulfilled the policies of *repose* and certainty inherent in the limitation provisions." 414 U.S. at 558 (emphasis added).

Of course, litigation over timely filed claims may well continue long after the period of repose has expired. There can be no argument, for example, that the policy of repose is not violated when a defendant is held liable to members of a timely filed class action in a case which is certified after the applicable limitary period has run. But the purpose of a statute of repose is not to provide defendants complete certainty as to the scope of their liability, but instead to fix the *outer limit* of their *potential* liability. *American Pipe* simply informs defendants that this outer limit includes possible liability to members of putative class actions filed within the limitary period of the statute of repose. Whether that liability is resolved through a certified class action or through individual suits by class members is irrelevant as far as the policies underlying the statute of repose are concerned. Accordingly, there is simply no conflict between the interests protected by statutes of repose, like those in Section 13 and Section 1658(b)(2), and the operation of *American Pipe* tolling.

American Pipe is also consonant with the purposes of the federal securities laws. Indeed, Congress appears to have presumed *American Pipe*'s applicability in the Private Securities Litigation Reform Act, Pub. L. 104-67, 109 Stat. 737 (1995) (" PSLRA"). That statute "made several important changes" to securities litigation practice, but "it pointedly did not change the requirements of Rule 23" and "incorporated Rule 23 explicitly in one portion of the statute." *In re Cavanaugh*, 306 F.3d 726, 738-39 (9th Cir. 2002) (citing 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(cc)). For example, the PSLRA sets forth provisions for selection of a lead plaintiff in class litigation. Those provisions, which often take longer to play out than the time allotted by a limitations or repose period, cannot operate effectively without tolling.[4] Accordingly, given Congress's express incorporation of Rule 23 in the PSLRA, it is plausible to conclude that Congress also intended to incorporate *American Pipe*'s interpretation of that Rule as well.

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4. Under the PSLRA's lead-plaintiff selection provisions, there is a 90-day notice period after which a court reviews applications, determines the losses of the applicants, evaluates whether the applicant with the greatest losses meets other Rule 23 requirements, and repeats that process as necessary until it finds a plaintiff who is both willing to serve and satisfies all Rule 23 requirements. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). Finally, the court must then afford other plaintiffs an opportunity to rebut the lead plaintiff's Rule 23 showing, and the PSLRA provides for discovery as part of that process. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II); 15 U.S.C. § 78u-4(a)(3)(B)(iv). This process may take substantial time.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

RICHARD B. DRUBEL
BOIES SCHILLER FLEXNER LLP
26 South Main Street
Hanover, NH 03755

PHILIP C. KOROLOGOS
BOIES SCHILLER FLEXNER LLP
575 Lexington Avenue, 7th Floor
New York, NY 10022

DAVID BOIES
Counsel of Record
BOIES SCHILLER FLEXNER LLP
333 Main Street
Armonk, NY 10504
(914) 749-8200
dboies@bsfllp.com

Counsel for Amicus Curiae

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CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
Petitioner,

v.

ANZ SECURITIES, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

MARK CHENOWETH
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

LYLE ROBERTS
Counsel of Record
GEORGE E. ANHANG
MATTHEW EZER*
COOLEY LLP
1299 Pennsylvania Ave., NW
Suite 700
Washington, DC 20004
(202) 842-7855
lroberts@cooley.com
Counsel for Amicus Curiae
*Admitted only in California

April 5, 2017

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. ADOPTING A RULE THAT PROVIDES FOR THE TOLLING OF A STATUTE OF REPOSE WOULD NOT SUBSTANTIALLY ADVANCE INVESTORS' INTERESTS 4

A. Investors Already Are Able—with Ease—to Adequately Protect Their Claims 4

(1) Investors Who Want to "Wait and See" Can Adequately and Easily Protect Their Claims by Becoming Non-Lead Named Plaintiffs 6

(2) Investors with Valuable Claims They Want to Litigate Themselves Can Protect Their Claims by Filing Separate Actions, Which Can then Be Consolidated with the Class Action 11

(3) Petitioner's and Its *Amici*'s Arguments that a Statute of Repose Unduly Burdens Investors and the Courts Are Unfounded 15

TABLE OF CONTENTS
(continued)

Page

B. Tolling a Statute of Repose Can Have Collateral Consequences that Prejudice the Vast Majority of Class Members 17

II. TOLLING A STATUTE OF REPOSE, WHILE NOT PROVIDING ANY SUBSTANTIAL OFFSETTING BENEFITS, UNDERMINES CONGRESS'S PURPOSES IN ENACTING THAT STATUTE AND OTHER FEDERAL SECURITIES STATUTES 23

III. ADOPTING A RULE THAT PROVIDES FOR THE TOLLING OF A STATUTE OF REPOSE WOULD NOT ADVANCE THE UNDERLYING PURPOSES OF FED. R. CIV. P. 23 24

CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

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818 F.2d 194 (2d Cir. 1987) 11

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No. 1:15-cv-08995 (S.D.N.Y. Nov. 16, 2015) 12

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627 F.3d 261 (7th Cir. 2010) 19

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807 F.3d 600 (4th Cir. 2015) 18

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2012 WL 12887767 (C.D. Cal. Nov. 19, 2012) 14

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134 S. Ct. 2398 (2014) 1

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2009 WL 1174638 (N.D. Tex. Apr. 29, 2009) 18

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(continued)

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551 U.S. 308 (2007) 9, 19

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No. 15-1416 (D.C. Cir. 2015) 2

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RULES

Fed. R. Civ. P. 15..... 9

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INTEREST OF *AMICUS CURIAE*

Washington Legal Foundation (WLF) is a non-profit, public-interest law firm and policy center with supporters in all 50 States.[1] Founded nearly 40 years ago, WLF devotes a substantial portion of its resources to advocating for free-market principles, individual and business civil liberties, limited government, and the rule of law.

To that end, WLF has regularly appeared before this and other federal courts in numerous cases raising issues related to the proper scope of the federal securities laws. *E.g.*, Brief of Washington Legal Foundation as *Amicus Curiae* in Support of Petitioners, *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318 (2015) (No. 13-435); Brief of the Washington Legal Foundation as *Amicus Curiae* in Support of Petitioners, *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) (No. 13-317). In particular, WLF has participated in litigation regarding the applicability of the statutes of repose and statutes of limitations for the bringing of securities law claims. *E.g.*, Brief of Washington Legal Foundation as *Amicus Curiae* in Support of Petitioner, *Kokesh v. SEC*, No. 16-529 (petition for

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[1] Pursuant to Rule 37.6 of the Rules of this Court, the undersigned hereby state that no counsel for Petitioners or Respondents authored any part of this brief, and no person other than *amicus curiae* or its counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a) of the Rules of this Court, letters of consent from all parties to the filing of this brief are on file or have been submitted to the Clerk of the Court.

cert. filed Oct. 18, 2016); Brief of Washington Legal Foundation as *Amicus Curiae* in Support of Petitioners, *Timbervest LLC v. SEC,* No. 15-1416 (D.C. Cir. appeal docketed Nov. 13, 2015).

Additionally, WLF's Legal Studies Division, the publishing arm of WLF, has published numerous studies, reports, and analyses on issues related to statutes of limitations and statutes of repose. *See, e.g.*, Eric J. Conn, *OSHA's Midnight Attempt to Overrule Federal Court's Decision Is Ripe for Rescission*, WLF Legal Opinion Letter, Feb. 24, 2017,), http://www.wlf.org/upload/legalstudies/legalopinionletter/022417LOL_Conn.pdf; Adam H. Charnes & Chris W. Haaf, *Fourth Circuit Misconstrues North Carolina's Statute of Repose—and State's High Court Cannot Help*, WLF Legal Opinion Letter, May 13, 2016,http://www.wlf.org/upload/legalstudies/legalopinionletter/051316LOL_Charnes.pdf; David Restaino, *High Court's Spill Act Statute of Limitations Ruling Alters New Jersey's Cleanup Landscape*, WLF Legal Opinion Letter, April 10, 2015; Samuel B. Boxerman, *Supreme Court Observations:* CTS Corp. v. Waldburger, WLF Legal Pulse, June 11, 2014.

Congress in § 13 of the Securities Act of 1933 imposes a 3-year statute of repose on the bringing of a civil action, and statutes of repose are not subject to tolling (unlike statutes of limitations). WLF is concerned that adopting a rule that provides for the tolling of the statute of repose in federal securities class actions would not substantially advance investors' interests, while unduly burdening defendants. WLF also is concerned that adopting such a rule may undermine or lead to uncertainty regarding other statutes of repose.

SUMMARY OF ARGUMENT

Petitioner's assertion that tolling the statute of repose for the claims of putative class members in federal securities class actions would greatly advantage investors and the judicial process rests on a pair of demonstrably incorrect assumptions.

First, Petitioner wrongly assumes that in the absence of tolling, investors cannot easily protect their claims and ability to opt out. Under the federal securities class-action procedures set forth in the Private Securities Litigation Reform Act of 1995, 109 Stat. 737 (codified at 15 U.S.C. §§ 77z–1 and 78u–4) ("PSLRA"), however, it is easy for investors to become passive named plaintiffs in a class action. Doing so during the repose period fully protects investors' ability to opt out at any time, without imposing any significant costs on themselves, any other parties, or the court. Despite becoming named plaintiffs, investors may remain passive in the action for as long as they choose, because under the PSLRA's procedures, it is only the court-appointed "lead plaintiff" who has oversight responsibility over the action and class counsel.

Second, Petitioner wrongly assumes that the tolling of a statute of repose does not impose countervailing burdens and costs that can outweigh whatever benefits it may confer. In fact, tolling substantially prejudices the vast majority of investors in a class by conferring greater settlement leverage on certain investors. As a result of that leverage, a defendant's settlement offer to the class is likely to be discounted by the defendant's expected "settlement tax"—*i.e.*, the often significant incremental costs necessary to settle, or litigate, opt-out claims that are strategically asserted by

investors for the first time long after the class action has commenced. Tolling a statute of repose expands the opportunities for shareholders to extract such a "settlement tax," by increasing the amount of time in which shareholders can remain in the shadows until circumstances permit them to exercise optimal bargaining power to secure a separate settlement.

In sum, tolling a statute of repose in a securities class action does not, on balance, substantially advantage the vast bulk of putative class members or the judicial process. Instead, its primary effects would be to undermine Congress's purposes in enacting the statute of repose, provide tactical advantages to a handful of strategic investors at the expense of the rest of the class (and counter to Congress's frequently stated desire to curb "extortionate settlements" in federal securities cases) and fail to advance the underlying purposes of Fed. R. Civ. P. 23.

ARGUMENT

I. ADOPTING A RULE THAT PROVIDES FOR THE TOLLING OF A STATUTE OF REPOSE WOULD NOT SUBSTANTIALLY ADVANCE INVESTORS' INTERESTS

A. Investors Already Are Able—with Ease—to Adequately Protect Their Claims

A federal securities class action typically is brought on behalf of a group of investors who have purchased a company's securities. The complaint alleges that these investors were injured by having purchased their securities at a price that did not reflect the true value of the securities. In terms of their desire to participate in the securities class

action, the investors usually fall into one of three categories.

First, there are investors who never want or need to exercise personal control over the litigation of their claims. In a securities class action, the vast majority of investors fit this description, usually because each investor has a relatively small damages claim, and the value of the claim is insignificant relative to the amount of resources that would be necessary for the investor to pursue the claim on its own. Indeed, the class-action device owes its very existence to this fact. As this Court has recognized, "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action[.]" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (1997)).

Second, there are investors who are content to remain passive class members throughout the litigation of the case, but who (i) attach substantial value to their ability to opt out of any settlement and would therefore seek to protect that ability, and (ii) attach sufficient value to their claim that if the court refused to certify the class, they might separately pursue their claims.

Third, and finally, there are investors whose damages claims are so significant that the investors have a strong incentive to control the litigation of their claims. These investors are, for the most part, sophisticated "institutional" investors. *See generally* Blair A. Nicholas & Ian D. Berg, *Why Institutional Investors Opt-Out of Securities Fraud Class Actions and Pursue Direct Individual Actions* at 1 (2009),

https://www.blbglaw.com/news/publications/data/00113/_res/id=File1/PLIreprint7_22_09#2.pdf ("By opting-out, an institutional investor has complete control over the prosecution of its own unique claims . . .").

A rule that provides for the tolling of a statute of repose is not needed to adequately protect the interests of *any* of these categories of investors. As a threshold matter, it is self-evident that the tolling of a statute of repose does not provide any substantial benefits to the first category of investors—*i.e.*, investors who neither want nor need to exercise their ability to opt-out or pursue litigation on their own, but are content to remain passive class members and let their fortunes rise or fall depending on the outcome of the class action.

Even investors of the second and third type described above, however, do not need tolling to adequately protect their claims and ability to opt-out. Nor is tolling needed to ensure that these investors' claims and ability to opt out are litigated in a manner that serves the interests of efficiency and judicial economy.

(1) Investors Who Want to "Wait and See" Can Adequately and Easily Protect Their Claims by Becoming Non-Lead Named Plaintiffs

Investors who are content to remain passive class members throughout the litigation of the case, but who (i) attach substantial value to their ability to opt-out of any settlement and would therefore seek to protect that ability, and (ii) attach sufficient value to their claim that if the court refused to certify the class, they might pursue their claim on

their own, do not need a rule that provides for the tolling of a statute of repose to adequately protect their interests. These investors—with minimal effort and in a manner that serves the interests of efficiency and judicial economy—already can adequately protect their claims and ability to opt out *by becoming named plaintiffs in the class action*.

It is not difficult to become a named plaintiff in a securities class action because of the procedural requirements of the Private Securities Litigation Reform Act. Under the PSLRA, once a federal securities class action complaint has been filed by any plaintiff, that plaintiff must, within 20 days, "cause to be published, in a widely circulated national business-oriented publication or wire service, a notice" that advises all class members that the suit has been filed, and the nature of the claims. 15 U.S.C. § 78u-4(a)(3)(A)(i)(I) (2012).

The PSLRA also requires courts to appoint a "lead plaintiff" within 90 days of the filing of a securities complaint. 15 U.S.C. § 78u-4(a)(3)(B)(i) (2012). The lead plaintiff has oversight responsibility over the litigation of the action, including oversight over "select[ing], control[ling], and monitor[ing] class counsel." William B. Rubenstein, Newberg on Class Actions §§ 3:52, 10:13 (5th ed. 2011); 15 U.S.C. § 78u-4(a)(3)(B)(v) (2012).

Once a lead plaintiff and lead counsel are appointed, courts invariably permit the lead plaintiff to file an amended complaint that will become the operative complaint in the case. If at that time, any other investors wish to fully protect their ability to opt out and file individual claims at a later date, they need simply to contact lead counsel and ask to

be included in the operative amended class action as named plaintiffs.

The PSLRA and Rule 23 contain no obstacles to the addition of non-lead named plaintiffs to an operative amended class-action complaint, and the naming of such plaintiffs is quite common.[2] Indeed,

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[2] For example, the court in *In re Lucent Technologies Inc. Securities Litigation*, No. 2:00-CV-621, 2002 WL 32815233 (D.N.J. July 16, 2002), noted the existence of "forty-one named, non-lead plaintiffs." *Id.* at *1. Likewise, in *Sanchez v. Crocs, Inc.*, 667 F. App'x 710 (10th Cir. 2016), the operative complaint included two non-lead named plaintiffs in addition to the lead plaintiff group. *Id.* at 714. In *In re Municipal Mortgage & Equity, LLC*, three non-lead named plaintiffs were included in the operative complaint. *See* Consolidated and Amended Class Action Complaint at 41-42, *In re Municipal Mortg. & Equity, LLC*, 876 F. Supp. 2d 616 (D. Md. 2012) (No. MJG-08-1961-MDL), *aff'd sub nom. Yates v. Mun. Mortg. & Equity, LLC*, 744 F.3d 874 (4th Cir. 2014). In *In re Citigroup, Inc.*, the district court noted that "although they have not been appointed as Lead Plaintiffs," two parties "are specifically named as plaintiffs" in the last-filed complaint. *See In re Citigroup, Inc.*, No. 08 Civ. 3095(LTS), 2011 WL 744745, at *1 (S.D.N.Y. Mar. 1, 2011), *aff'd sub nom. Finn v. Barney*, 471 F. App'x 30 (2d Cir. 2012). In *Ryan v. Flowserve Corp.*, two pension funds served as non-lead named plaintiffs alongside the lead plaintiff pension fund. *See* Fifth Amended Complaint at 126, *Ryan v. Flowserve Corp.*, 245 F.R.D. 560 (N.D. Tex. 2007) (No. 3:03-CV-1769-M), *rev'd in part, vacated in part sub nom. Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221 (5th Cir. 2009). In *In re Satyam Computer Services Ltd. Securities Litigation*, there were two non-lead named plaintiffs in the operative securities class-action complaint. *See* First Amended Consolidated Class Action Complaint at 9-10, *In re Satyam Comput. Servs. Ltd. Sec. Litig.*, 915 F. Supp. 2d 450 (S.D.N.Y. 2013) (No. 09-MD-2027-BSJ).

in one of the key recent securities cases addressed by this Court—*Tellabs Inc. v. Makor Issues & Rights*, 551 U.S. 308 (2007)—the final operative complaint named four non-lead plaintiffs who had also purchased Tellabs stock.[3] Thus, there can be no doubt that those investors who wish to protect their abiity to bring their own claims or opt out can, with relative ease, simply become named plaintiffs.

This procedure also is available to investors who want to protect their ability to bring their own claims or opt out after a federal securities class action is underway. These investors can ask class counsel to file a motion adding them to the complaint as named plaintiffs, which is permitted by Fed. R. Civ. P. 15 & 21. *See generally* Wright & Miller, 6. Fed. Prac. & Proc. Civ., § 1474 (3d ed. 2016).

Although under both Fed. R. Civ. P. 15 and 21 "the moving party must demonstrate an absence of prejudice to the nonmoving party," *Data General Corp. v. Grumman Systems Support Corp.*, 825 F. Supp. 340, 344 (D. Mass. 1993), *aff'd in part, rev'd in part on other grounds*, 36 F.3d 1147 (1st Cir. 1994), this burden will not be hard to satisfy. Lead plaintiffs will need no convincing to move to add additional named plaintiffs, because they will prefer to retain control over the entire action rather than see it splinter. Defendants will likewise prefer to

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[3] *See* Second Consolidated Amended Class Action Complaint at 8, *Johnson v. Tellabs, Inc.*, 303 F. Supp. 2d 941 (N.D. Ill. 2004) (No. 02-CV-4356), *aff'd in part, rev'd in part sub nom. Makor Issues & Rights v. Tellabs Inc.*, 437 F.3d 558 (7th Cir. 2006), *vacated*, 551 U.S. 308 (2007), *remanded to* 513 F.3d 702 (7th Cir. 2008).

add named plaintiffs if the alternative is defending against multiple actions. As a consequence, it will be straightforward to demonstrate "an absence of prejudice to the nonmoving party." *Id.*

Once the new named plaintiffs are added to the complaint, they will not have to take on any additional responsibilities. There is, for example, no requirement that named plaintiffs serve as class representatives (although they could later seek to serve as class representatives if they wish). *See* William B. Rubenstein, Newberg on Class Actions § 2:1 n.8 (5th ed. 2011) ("Courts use the phrase 'class representatives' interchangeably with the phrase 'named plaintiffs' although the two are not necessarily the same. . . . Class counsel need not put forward all named plaintiffs, or only named plaintiffs, as proposed class representatives."). Moreover, courts routinely refuse to permit discovery requests against named plaintiffs who are not class representatives, reasoning that those plaintiffs are no different than absent class members. *See, e.g.*, *In re Lucent Techs., Inc. Sec. Litig.*, 2002 WL 32815233, at *2 ("[T]he forty-one non-lead, non-representative plaintiffs should be treated as passive class members and thus not subject to discovery."); *In re USA Classic Sec. Litig.*, No. 93 Civ. 6667, 1995 WL 686724, at *1 (S.D.N.Y. Nov. 17, 1995) (same); *In re Carbon Dioxide Indus. Antitrust Litig.*, 155 F.R.D. 209, 211-12 (M.D. Fla. 1993) (same); *see generally* William B. Rubenstein, Newberg on Class Actions § 9:12 (5th ed. 2011). These decisions are consistent with the renewed emphasis on proportionality in discovery found in the recent amendments to the Rules of Civil Procedure. *See, e.g.*, Fed. R. Civ. P. Rule 26(b).

Once investors become named plaintiffs (prior to the running of the repose period), they no longer need to worry about the impact of the statute of repose in the event there is a denial of class certification. Even after a denial of class certification —including if that event occurs after the expiration of the repose period—investors will be able to pursue the claims that were originally asserted in the class-action complaint in which they were a named plaintiff. *See, e.g.*, *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 194, 197 (2d Cir. 1987) ("The denial of class certification does not preclude individual plaintiffs properly before the court from pressing their own claims.").

Similarly, if a class settlement is reached from which an investor who was added as a named plaintiff to the operative complaint wants to opt out, the investor can just continue to litigate the original action in its own name. The settlement class will be dismissed from the action as a result of the settlement. The investor can then choose to continue to litigate or pursue a separate settlement. In sum, by being added as a named plaintiff to the operative class-action complaint, an investor preserves his ability to pursue the action even in the event there is a class settlement or denial of class certification either during or outside the period of repose.

(2) Investors with Valuable Claims They Want to Litigate Themselves Can Protect Their Claims by Filing Separate Actions, Which Can then Be Consolidated with the Class Action

There also may be some investors whose damages claims are so significant that the investors

have a strong incentive to control the litigation of their claims. These investors do not need a rule that provides for the tolling of a statute of repose to adequately protect their interests. These investors can simply file a separate suit, which can then be consolidated with the underlying class action.

Recently, several such investors pursued this course and opted out of *In re Petrobras Securities Litigation*, No. 14–cv–9662 (S.D.N.Y. filed Dec. 8, 2014). The class-action complaint in *Petrobras* alleged that Petrobras's market capitalization dropped by more than $270 *billion* as a result of fraud. Consolidated Fourth Amended Complaint at 1, *In re Petrobras Sec. Litig.*, No. 14–cv–9662 (S.D.N.Y. Nov. 30, 2015), ECF No. 342. Unsurprisingly, the massive damages available to individual plaintiffs (and, perhaps, the likelihood that the company would enter bankruptcy) spurred large shareholders to opt out. Although not all of the opt-out plaintiffs identified their damages or individual holdings, those that did generally held hundreds of thousands or millions of shares. *See, e.g.*, Complaint at 13-14 & Apps. A-C, *Skagen AS v. Petroleo Brasileiro S.A.–Petrobras*, No. 1:15-cv-02214-JSR (S.D.N.Y. Mar. 23, 2015); Complaint App. A, *Alaska Dep't of Revenue v. Petroleo Brasileiro S.A.–Petrobras*, No. 1:15-cv-08995 (S.D.N.Y. Nov. 16, 2015).

Amici who support Petitioner seek to turn *Petrobras* on its head by arguing that these class members only opted out because they feared the expiration of the statute of repose. *See* Br. of Institutional Investors as Amici Curiae Supporting Pet'r ("Br. of Institutional Investors") 15-16 (Mar. 6, 2017); *cf.* Pet'r Br. 24. But, the Institutional

Investors later acknowledge that a few of the numerous opt-out plaintiffs *failed to account for the statute of repose* and "had their Securities and Exchange Act claims dismissed." Br. of Institutional Investors 16 (emphasis added). No plaintiff would attempt to preserve their claims by filing an opt-out claim *after the repose period expired.*

Rather than being motivated by concerns over the statute of repose, the behavior of the class members in *Petrobras* appears to be completely consistent with the behavior of large investors in other high-profile securities litigations. For example, the *AOL/Time Warner* securities class action settled for $2.4 billion in 2006. Nicholas & Berg, *supra* at 2. Well before that settlement, more than 100 investors with large claims decided to pursue their own claims. The Regents of the University of California, for example, opted out in 2003 and pursued their claim until a 2007 settlement. *AOL Time Warner Inc. Opt-Out Litigations*, Robbins, Geller, Rudman & Dowd, LLP (last visited Apr. 4, 2017), https://www.rgrdlaw.com/cases-aol-time-premium-recoveries.html.

There is no reason that large investors who want to control their own claims cannot file separate actions before the repose period expires. Indeed, these investors can ascertain the value of their claim and determine that it requires personal attention as soon as the class action is filed.

The fact that these suits get filed *prior* to the running of the repose period does not impact judicial economy—courts do not experience *additional* burdens merely because investors file an action *sooner*. To the contrary, courts (and parties) are likely to benefit if these investors are required to opt

out and file their own actions before the repose period expires, especially from the consolidation of discovery across multiple overlapping actions.[4] When parallel actions are consolidated, defendants can review documents only once in response to document requests. They can conduct the factual investigation necessary to respond to interrogatories once, rather than repeating the process again years later after employees have left the company. And, witnesses only need to be deposed once.

The benefits of coordinated discovery are far more likely to be realized if investors are forced to file actions that they intend to bring anyway before the repose deadline. Witnesses may not yet have been deposed, and the review of documents may not have been completed. As a result, by enforcing the statute of repose against investors who opt out of class actions, actions that would have been filed anyway become easier to judicially administer.

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4 *See, e.g.*, *MacAlister v. Guterma*, 263 F.2d 65, 69 (2d Cir. 1958) ("The benefits achieved by consolidation and the appointment of general counsel, [including] elimination of duplication . . . will most certainly redound to the benefit of all parties to the litigation."); *Waldman v. Electrospace Corp.*, 68 F.R.D. 281, 283 (S.D.N.Y. 1975) ("It is well recognized that consolidation of stockholders' suits often benefits both the court and the parties by expediting pretrial proceedings, avoiding duplication of discovery and minimizing costs."); *Gudimetla v. Ambow Educ. Holding Ltd.*, No. CV-12-5062 PSG (AJWx), 2012 WL 12887767, at *2 (C.D. Cal. Nov. 19, 2012) ("Consolidation would avoid duplication of efforts by the parties during pretrial discovery and in trial.").

(3) Petitioner's and Its *Amici*'s Arguments that a Statute of Repose Unduly Burdens Investors and the Courts Are Unfounded

Petitioner and its *Amici* fail to recognize that investors generally fall into one of the three categories discussed above and, as a result, caution the court about hypothetical burdens that will never materialize. Indeed, Petitioner and its *Amici* paint an entirely unrealistic portrait of investors and use that as a basis for the litany of problems that they assert refusing to toll the statute of repose will cause. Specifically, they contend that class members both "prefer . . . to remain members of the class and not intervene or file separate actions," Br. of Institutional Investors 11, *and* nevertheless will actively participate in the action if they intervene or otherwise become involved in the action. *See id.* at 18-19.

Investors do not possess both of these contrary impulses. Rather, as discussed above (and in accordance with common sense), they will *either* vigorously pursue their own claims *or* seek to remain a part of the class action. To the extent that large investors want to take control of their claims and pursue individual actions, they will do so. Enforcing the statute of repose against these investors does not impact judicial economy at all, because these investors will file their own claims anyway.

On the other hand, the investors who are content to remain passive class members throughout the litigation of the case, but who (i) attach substantial value to their ability to opt out of any settlement and would therefore seek to protect that ability, and (ii) attach sufficient value to their claim

that if the court refused to certify the class, they might pursue their claims on their own, can simply utilize the procedure discussed above and seek to be added as a named plaintiff. *See supra* Section I.A.1. They will not have to take an active role in the litigation or do anything they would not have done as class members.

It is therefore unsurprising that although Petitioner's *Amici* warn that, for example, investors "seeking to preserve their rights in the event of denial of class certification would have needed to file protective actions in as many as 1175 [Rule 10b-5] cases," Br. of Civil Procedure and Securities Law Professors as Amici Curiae Supporting Pet'r ("Br. of Civil Procedure and Securities Law Professors") 11, they are unable to point to any *actual* hardships that have materialized in the more than three years since *IndyMac* was decided. In most cases, there is no reason for investors to take protective action, because they have no interest in an individual action at all.[5]

Amici's supposed concerns that enforcing the statute of repose will lead to extensive motion

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[5] Indeed, few investors opt out of securities class actions at all. Although it is difficult to estimate exactly how many opt-out actions are filed annually, one recent study found that, between 1996 and 2014, investors opted out of only 3.3% of securities class-action settlements. Amir Rozen et al., *Opt-Out Cases in Securities Class Action Settlements 2012-2014 Update*, Cornerstone Research, 2 (2016), https://www.cornerstone.com/Publications/Reports/Opt-Out-Cases-in-Securities-Class-Action-Settlements-2012-2014.

practice on the issue of intervention, 4, 17-19, or that protective actions will be filed in "distant forums," *see, e.g.*, *id.* at 4, 17, 19, are likewise illusory. There is simply no reason for class members who prefer to "remain a part of the class" to take either course or to do *anything* other than ask to become named plaintiffs, which, as explained above, imposes minimal burdens on courts and the judicial process.

B. Tolling a Statute of Repose Can Have Collateral Consequences that Prejudice the Vast Majority of Class Members

Not only does the tolling of the statute of repose provide investors with negligible benefits (*see supra* Section I), but it also can substantially prejudice the interests of the vast majority of class members in a federal securities class action.

Tolling provides large investors with an enhanced opportunity to wait until settlement negotiations for the class action are underway—or after a settlement with the lead plaintiff has been negotiated—to opt out and litigate their claims and/or pursue an individual settlement with the defendants. Investors who opt out at this late stage of the litigation possess two forms of undue leverage.

First, the defendants in a securities class action often seek a fair and reasonable settlement with the class in order to obtain "global peace." *See Sullivan v. DB Inv. Inc.*, 667 F.3d 273, 310-11 (3rd Cir. 2011) ("From a practical standpoint . . . achieving global peace is a valid, and valuable, incentive to class action settlements."). If global peace cannot be achieved, the value to defendants of reaching a settlement with the class is greatly

diminished. *See, e.g.*, *Berry v. Schulman*, 807 F.3d 600, 613 (4th Cir. 2015) ("[D]efendants like Lexis surely will not agree to settlements like this one if they cannot buy something approaching global peace."); *Klein v. O'Neal, Inc.*, No. 7:03-CV-102-D, 2009 WL 1174638, at *3 (N.D. Tex. Apr. 29, 2009) ("In a class action settlement setting, defendants seek and pay for global peace—*i.e.*, the resolution of as many claims as possible. Accordingly, allowing plaintiffs to opt out of a class action after the deadline and during a period of active settlement negotiations so that they can pursue their claims individually can make settlement less valuable to defendants and less likely to occur."). Conversely, if global peace is feasible, defendants attach so much value to it that they may be prepared to pay a premium to reach a comprehensive class settlement.

The desire for global peace obviously can be frustrated by the litigation of opt-out claims, and so to achieve true global peace, defendants need to settle any pending or threatened opt-out suits in addition to the underlying class action. The strong impetus for defendants to settle opt-out claims gives the opt-out plaintiffs significant leverage in the settlement of their claims. *See, e.g.*, Michael A. Perino, *Class Action Chaos? The Theory of the Core and an Analysis of Opt-Out Rights in Mass Tort Class Actions*, 46 Emory L.J. 85, 131 (1997) ("[T]he ability to opt-out can give [large] claimants significant bargaining leverage over other class members who do not have credible opt-opt options"); *see also* Rozen et. al., *supra*, at 4 ("The mere threat of an opt-out can be a powerful negotiating tool for plaintiffs."). Unless defendants are able to appease

these large investors, they will be unable to secure the global peace they seek.

Second, opt-out claims can be unduly burdensome for defendants to litigate (*see supra* Section I.A.2 regarding the potential for expansive, uncoordinated discovery across multiple actions). This too gives defendants the motivation to quickly resolve any opt-out claims, thereby providing further leverage to opt-out plaintiffs in the settlement of their claims.[6]

The foregoing two forms of leverage that opt-out plaintiffs have (often) lead them to seek to extract individual settlements with defendants that are disproportionate to what the class members will receive. Indeed, plaintiffs' attorneys advise large shareholders to "strategically" opt out of "certain securities class actions" to "achieve[] significant premiums on their recovery of losses." Nicholas & Berg, *supra* at 1. Upon opting out, some shareholders settle before even filing a complaint, suggesting that their sole purpose in opting out was to obtain a more favorable settlement. *See id.* ("Notably, a substantial majority of the opt-out

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[6] *See, e.g., Am. Bank v. City of Menasha*, 627 F.3d 261, 265–66 (7th Cir. 2010), as amended (Dec. 8, 2010) ("The purpose of authorizing stays of state-court discovery relating to federal securities litigation is similar to that of the enhanced pleading requirements of the Private Securities Litigation Reform Act at issue in the *Tellabs* litigation, and of the Supreme Court's recent *Iqbal* and *Twombly* decisions. *It is to prevent settlement extortion—using discovery to impose asymmetric costs on defendants in order to force a settlement advantageous to the plaintiff regardless of the merits of his suit.*" (emphasis added) (citations omitted)).

settlements in *Qwest* involved institutional investors that reached resolution of their opt-out claims before filing a complaint or engaging in any litigation or discovery.").

The settlement leverage obtained by opt-out claimants—especially those who opt out long after the commencement of the case—ultimately prejudices all investors who are in the class and potentially covered by a class settlement. Notably, the defendant's class-settlement offer in such circumstances is likely to be discounted by the defendant's expected "settlement tax"—*i.e.*, the often significant additional incremental costs necessary to settle, or litigate, the opt-out claims. In other words, in light of the "significant premium that defendants place on global peace," defendants are likely to offer a reduced settlement to remaining class members if opt outs occur (or are anticipated). Jon Romberg, *The Hybrid Class Action as Judicial Spork: Managing Individual Rights in a Stew of Common Wrong*, 39 J. Marshall L. Rev. 231, 245 (2006). Thus, "absent class members will likely be harmed when opt-out is permitted and class members are allowed to defect from a group that furthers their common interests." *Id.; see also* Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. Pa. L. Rev. 103, 133 (2006) ("[C]lass members and class counsel effectively subsidize opt-outs, who are able to free-ride on the litigation work of class counsel, are

relieved of litigating often difficult class certification issues, and only have to prove their own damages.").[7]

Moreover, this "settlement tax" can be substantial depending on the overall circumstances. In cases (like *Petrobras* or *AOL/Time Warner*) where "full or even partial recovery of [alleged] damages would likely bankrupt the defendant company," investors are forced to compete for the limited funds that are available. *See* Nicholas & Berg, *supra* at 2. In such cases, opt-out plaintiffs often are able to "extract a disproportionate share of the class recovery" by using their bargaining power to obtain more of the defendants' limited resources. Romberg, *supra,* at 244-45; *accord* Perino, *supra* at 97 (opting out "may permit individual litigants to obtain a disproportionately large portion of [limited] assets").

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[7] *See also, e.g.*, David Betson & Jay Tidmarsh, *Optimal Class Size, Opt-Out Rights, and "Indivisible" Remedies*, 79 Geo. Wash. L. Rev. 542, 571-72 (2011) ("[A]n opt-out right creates the possibility of strategic behavior, in which some parties who stand to gain from class treatment nonetheless opt out (or threaten to do so) to extract rents from members remaining in the class."); Perino, *supra*, at 105 ("In effect, small claimants may subsidize large claimants' individual suits and similarly situated plaintiffs may receive substantially different recoveries" because opt-outs are able to "benefit from . . . class discovery or trial preparation that may be more extensive than any individual litigant could afford on its own."); David Rosenberg, *Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master*, 69 B.U. L. Rev. 695, 705-06 (1989) (class actions "remov[e] the costs and risks of trying common questions" for opt-outs, allowing their actions to "be subsidized by the public, particularly by the segment composed of the rest of the victim class").

The plaintiffs' bar acknowledges this possibility. When a limited fund is available, plaintiffs' lawyers advise large investors to opt out to "recover a larger percentage of its losses without any such recovery limitation based on potential insolvency of the defendant company." Nicholas & Berg, *supra*, at 2.

Large investors also are incentivized to elicit a significant "settlement tax" in cases where a defendant has already made a substantial settlement offer to the class (*i.e.*, the "certain class actions" where opting out is advantageous). In such cases, the size of the settlement notifies investors that the defendant is willing to devote significant resources to obtain global peace, and therefore incentivizes larger investors to use their bargaining power to obtain a larger "settlement tax."[8] Tolling a statute of repose plainly would expand the opportunities for strategic shareholders to extract such a "settlement tax," by increasing the amount of time in which shareholders can remain in the shadows until the case reaches a stage where circumstances permit them to exercise their enhanced bargaining power.

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[8] It is therefore no accident that studies have found that "as class-action settlements get larger the propensity of plaintiffs to bring an opt-out case also increases." Rozen et. al., *supra*, at 3.

II. TOLLING A STATUTE OF REPOSE, WHILE NOT PROVIDING ANY SUBSTANTIAL OFFSETTING BENEFITS, UNDERMINES CONGRESS'S PURPOSES IN ENACTING THAT STATUTE AND OTHER FEDERAL SECURITIES STATUTES

As discussed above, if the Court allows tolling of the statute of repose, defendants would face a greater prospect of opt-out investors seeking disproportionately large individual settlements, and defendants would also be subjected to a variety of other discovery and litigation burdens. This outcome is contrary to the purposes of a statute of repose. It also undermines Congress's efforts at securities class-action reform.

Congress long ago recognized the propensity for investors to file "strike suits" that asserted federal securities law claims on a class basis to extort settlements from corporate defendants. In an effort to protect defendants from these vexatious suits and implement procedural safeguards against abusive litigation, Congress enacted landmark legislation—the Private Securities Litigation Reform Act of 1995, and the Securities Litigation Uniform Standards Act of 1998—which governs all securities class actions filed in federal court, including the instant action. As reflected in the House Conference Report accompanying what would later be enacted as the PSLRA, the curtailment of "extortionate settlements" was among the intended effects of the PSLRA. H.R. Conf. Rep. No. 104–369, pp. 31-32 (1995); *see also Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 80-81 (2006) (referring to exorbitant settlements as a ground for the PSLRA's procedural reforms).

It plainly would undermine the effectiveness of statutes of repose—and likewise undermine the objective of the PSLRA and SLUSA to curb "extortionate settlements"—if a statute of repose could be tolled. The inevitable result would be that opt-out investors could lie in wait for many years after the operative events and the filing of an underlying class action, only to emerge at a point when defendant companies would be most vulnerable to succumbing to an investor's exorbitant settlement demands.

III. ADOPTING A RULE THAT PROVIDES FOR THE TOLLING OF A STATUTE OF REPOSE WOULD NOT ADVANCE THE UNDERLYING PURPOSES OF FED. R. CIV. P. 23

Finally, it bears emphasis that adopting a rule that provides for the tolling of the statute of repose would not further the purposes of Fed. R. Civ. P. 23. The Supreme Court has recognized that "'[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action[.]'" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)). Refusing to toll a statute of repose would not undermine that policy or achieve a harsh result. The investor whose "small recover[y]" would not provide sufficient incentive to "bring a solo action" before a class action is filed does not benefit from the tolling of a statute of repose (and, as shown above, may be prejudiced by it).

Moreover, if an investor has the wherewithal and interest to file its own action if class certification is denied, it certainly would have the same

wherewithal and interest to file a complaint, move to intervene, or, most easily, seek to be added as a named plaintiff after a class- action complaint is filed. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 813 (1985) ("If . . . the plaintiff's claim is sufficiently large or important that he wishes to litigate it on his own, he will likely have retained an attorney or have thought about filing suit, and should be fully capable of exercising his right to 'opt-out.'"). Thus, refusing to apply tolling to the statute of repose in the 1933 Act would simply require investors who have the ability to take steps to preserve their ability (without a need for tolling) to do so within three years, while at the same time providing the defendants the finality and certainty that the statute of repose was intended to achieve. *See, e.g.*, *Police & Fire Ret. Sys. of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 109 (2d Cir. 2013) ("Given the sophisticated, well-counseled litigants involved in securities fraud class actions," refusing to toll the statute of repose is unlikely to "burden the courts and disrupt the functioning of class action litigation.").

CONCLUSION

In sum, refusing to toll the statute of repose protects the vast majority of class members and defendants' repose interests without any significant offsetting burdens for larger investors and the courts. WLF therefore respectfully urges the Court to affirm the Second Circuit and refuse to extend *American Pipe* tolling to the statute of repose in § 13 of the Securities Act of 1933.

MARK CHENOWETH
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

LYLE ROBERTS
Counsel of Record
GEORGE E. ANHANG
MATTHEW EZER*
COOLEY LLP
1299 Pennsylvania Ave., NW
Suite 700
Washington, DC 20004
(202) 842-7855
lroberts@cooley.com
Counsel for Amicus Curiae

*Admitted only in California

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RECORD AND BRIEF

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In The Supreme Court Of The United States

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM,
PETITIONER,

v.

ANZ SECURITIES, INC., ET AL.,
RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMICUS BRIEF OF THE STATES OF WASHINGTON, ALASKA, HAWAII, IDAHO, IOWA, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MONTANA, NEW MEXICO, OREGON, PENNSYLVANIA, RHODE ISLAND, AND VIRGINIA IN SUPPORT OF PETITIONER

ROBERT W. FERGUSON
Attorney General

CALLIE ANNE CASTILLO
Deputy Solicitor General
Counsel of Record

MARY LOBDELL
Senior Counsel

1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6200
calliec@atg.wa.gov

Additional Counsel Listed Following Signature Page

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TABLE OF CONTENTS

INTEREST OF AMICI STATES 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

A. The Second Circuit's Rejection of *American Pipe* Impairs the Securities Laws 3

B. The Second Circuit's Rule Creates Barriers to the States' Ability to Protect the Public Interest 7

C. The Second Circuit's Rule Undermines the Value of Securities Class Actions 11

D. The Second Circuit's Rule Impedes Individual Access to Justice 14

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Amchem Prods., Inc. v. Windsor
521 U.S. 591 (1997) 14

American Pipe & Constr. Co. v. Utah
414 U.S. 538 (1974) 1, 3-10, 12, 15

Bateman Eichler, Hill Richards, Inc. v. Berner
472 U.S. 299 (1985) 5

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462 U.S. 345 (1983) 5

Ernst & Ernst v. Hochfelder
425 U.S. 185 (1976) 4-5

In re IndyMac Mortgage-Backed Sec. Litig.
793 F. Supp. 2d 637 (S.D.N.Y. 2011) 9

In re Lehman Bros. Sec. & ERISA Litig.
655 Fed. App'x 13, 2016 WL 3648259
(2d Cir. July 8, 2016) 8

J.I. Case Co. v. Borak
377 U.S. 426 (1964) 5

Kuwait Inv. Office v. Am. Int'l Grp., Inc.
128 F. Supp. 3d 792 (S.D.N.Y. 2015) 8

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109 F.3d 338 (7th Cir. 1997) 14

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721 F.3d 95 (2d Cir. 2013) 5, 8-9, 12

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829 F.3d 173 (2d Cir. 2016) 8

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15 U.S.C. § 77r(c)(1) 4

15 U.S.C. § 78u-4(3) 12

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Pub. L. 104-67 (Dec. 22, 1995) 12

Rules

Rule 23 ..... 9, 10, 12

Rule 23(c)(1)(A) 12

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7AA *Fed. Prac. & Proc. Civ.* § 1787.3,
Westlaw (3d ed. & Suppl. Jan. 2017) 12

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William B. Rubenstein et al., *Newburg on Class Actions* § 4:47 (5th ed. 2016) 11

Pending Litigation

Petrobras Securities Litigation

New York City Emp. Ret. Sys. et al. v. Petroleo Brasileiro S.A.-Petrobras et al., No. 1:15-CV-02192 (S.D.N.Y. filed Mar. 23, 2015).....13

Washington State Inv. Bd. v. Petroleo Brasileiro S.A.-Petrobras et al., No. 1:15-cv-03923 (S.D.N.Y. filed Apr. 10, 2015) 13

INTEREST OF AMICI STATES

States invest billions of dollars of pension funds on behalf of public employees, including teachers, law enforcement officers, firefighters, and judges. They also invest public funds to support myriad civic purposes, including schools, colleges and universities, injured workers, and developmental disability programs. States also sometimes manage state sovereign wealth funds to achieve specific public purposes, including conserving revenue from natural resources, enhancing education and public infrastructure, and providing tax relief to citizens and businesses. The States manage these funds under various legal and fiduciary principles and will take affirmative legal action to protect the public's investments.

State Attorneys General, as the chief legal officers of their States, are on the front lines of protecting the States' investments and enforcing securities laws. State Attorneys General actively litigate on behalf of the States and citizens to expose financial fraud and recover lost assets. This litigation on behalf of beneficiaries and the public plays an essential role in holding corporations accountable for wrongdoing in the financial markets.

Amici States thus have a significant interest in the merits of this case. Continued application of the *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), class action tolling rule to the limitation period found in the Securities Act will ensure continued access to justice, deter corporate abuse, and allow for the efficient recovery of lost

funds for the benefit of the public and beneficiaries alike.

SUMMARY OF ARGUMENT

States and other affected investors rely on *American Pipe* to toll the limitation period for actions under the Securities Act. *American Pipe* creates a consistent rule of law that protects the rights of all and promotes efficient class action litigation. The Second Circuit's rejection of this rule for class members facing Section 13's limitation period harms the States and the public.

The Second Circuit's decision undermines the purposes of securities laws, and impairs enforcement by the States and others. Vigorous public *and* private enforcement of the securities laws deters fraud and contributes to healthy financial markets. The Second Circuit's decision weakens private securities litigation, and thus puts a significant burden on States and other public regulators seeking to protect the public. It directly impairs the deterrence and compensation goals of the securities laws by allowing violators to escape liability, and leaving injured investors without recourse, simply because of the passage of time during the course of securities litigation.

The Second Circuit's decision also imposes needless administrative and fiscal burdens on the States and judicial system. Without the *American Pipe* rule, the States can no longer be assured that class action representation protects their interests. States must unnecessarily expend resources monitoring and assessing every securities class action to predict whether continued participation in

the class poses a risk to their claims. To preserve their rights, States will also be forced to take preventative action in the form of premature intervention or opt-out litigation. Neither comports with the purpose and protections of class litigation, and both waste valuable public resources.

Finally, the Second Circuit's decision diminishes the value of aggregate securities litigation and imposes significant barriers to individual access to justice. Rather than encouraging the efficient accumulation and resolution of securities claims, the decision leads to duplicative, unnecessary litigation. It encourages sophisticated class members to file early intervention motions to protect their claims from dismissal, while encouraging others to file separate actions. At the same time, it leaves other smaller, less sophisticated investors without any means to protect their rights if class certification fails or their claims are otherwise dismissed.

This Court must reverse to rectify these pointless encumbrances and ensure continued access to justice for all.

ARGUMENT

A. The Second Circuit's Rejection of *American Pipe* Impairs the Securities Laws

Under *American Pipe*, the filing of a class action complaint temporarily suspends the applicable limitation period for all class members "who would have been parties had the suit been permitted to continue as a class action." *American*

Pipe, 414 U.S. at 554. This provides a consistent rule of law that recognizes both the practicality and the necessity of tolling a limitation period to protect the rights of class members, and that promotes efficiency and economy in class action litigation. *Id.* at 553-56. The Second Circuit's rejection of this rule for the limitation period in Section 13 undermines the purpose of the securities laws, and impairs comprehensive enforcement of them.

States enforce securities laws in tandem with the federal government through regulatory and criminal actions. *See, e.g.*, 15 U.S.C. § 77r(c)(1) (allowing States to investigate and bring state enforcement actions with respect to "fraud or deceit" in connection with securities transactions). More frequently, states and private citizens enforce the laws by filing and participating in civil securities class actions. These different enforcement actions work together as a "three-legged stool" to hold securities violators accountable and to ensure victims of security fraud are compensated. *See* Melanie Gray, Vanessa Chandis, & Kristen M. Echemendia, *Striking the Right Balance: Public versus Private Enforcement Laws—What Will We Learn From This Financial Meltdown?* 60 Syracuse L. Rev. 449, 449-50 (2010).

Vigorous enforcement of the securities laws deters fraud and contributes to healthy financial markets. James J. Park, *Rules, Principles, and the Competition to Enforce the Securities Laws*, 100 Cal. L. Rev. 115, 128 (2012). It also furthers Congress' goals of protecting investors, promoting honesty and fair dealing, and compensating victims. *Cf. Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195

(1976) (recapping congressional purpose for enacting the Securities Acts of 1933 and 1934). This Court has long recognized that private actions are an "effective weapon in the enforcement of securities laws" and a "necessary supplement" to public enforcement actions. *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)). It is thus the combination of public and private enforcement that "together provide a means for defrauded investors to recover damages and a powerful deterrent against violations of the securities laws." S. Rep. No. 104-98, at 8, *reprinted in* 1995 U.S.C.C.A.N. 679, 687; *see also Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 174 n.10 (2008) (Stevens, J., dissenting) (quoting same). The Second Circuit's rejection of *American Pipe* tolling in the face of Section 13's limitation period impairs these important enforcement mechanisms and regulatory goals by undercutting the important third leg of the enforcement stool—private securities class litigation.

Prior to the Second Circuit's decisions in *Police & Fire Retirement System of Detroit v. IndyMac MBS, Inc.* (*IndyMac*), 721 F.3d 95 (2d Cir. 2013), and this case, the commencement of a securities fraud class action protected the interests of *all* purported members of the class *until* class certification was resolved. *American Pipe*, 414 U.S. at 554; *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354-55 (1983). States could therefore preserve valuable resources and be selective in their enforcement actions knowing that rights of affected investors were protected through private class litigation. This assurance is no longer true in the face of the Second

Circuit's decisions, and puts an unsustainable burden on States and other public regulators.

While States and other public entities may increase their regulatory and litigation efforts to cover the gap, they simply do not have the resources to police the entire securities market and hold every violator accountable. Without the necessary supplement of private securities litigation to protect the interests of all class members, the enforcement value of the securities laws is impaired. Would-be perpetrators will have less of an incentive to avoid fraudulent behavior when the risk of enforcement is lowered, or when they may be required to compensate only a small share of investors' losses. Likewise, making private enforcement more difficult makes it more likely that victims of securities fraud will be left without compensatory recourse.

The Second Circuit has imposed unnecessary barriers to achieving the securities laws' purposes and goals. As described in the Petitioner's brief, the Second Circuit's rejection of *American Pipe* tolling in this context is not mandated by any case law or statute. It also contravenes longstanding application of the rule to protect the public's interests. In contrast, applying *American Pipe* furthers the deterrence and compensation objectives of the securities laws. It provides stability to the States, institutional investors, and individual enforcement efforts. It also promotes justice by ensuring that violators do not escape liability and injured investors are left without compensation simply because of the passage of time.

B. The Second Circuit's Rule Creates Barriers to the States' Ability to Protect the Public Interest

The *American Pipe* tolling rule also helps the States protect their public investments while efficiently managing their fiduciary responsibilities. States, through designated agencies, act as trustees or have trustee-like duties over the assets they manage. As fiduciaries, the States have a duty to take reasonable steps to enforce claims associated with assets they manage. *Restatement (Second) of Trusts* § 177 (1959). States, therefore, frequently participate in securities litigation, often serving as lead plaintiffs or as passive members of private class actions. Rejecting application of *American Pipe* for the limitation period in the securities act would impose needless administrative and fiscal burdens on the States.

Without *American Pipe*, the States can no longer be assured that participation in class actions will protect their interests. Instead, the States must evaluate each case to assess the risk of dismissal or class certification failure. This requires in-depth analysis of the veracity of the pleadings and the foundations of each claim in an attempt to predict whether the class will survive. It also requires analyzing myriad possible defenses and theories that could defeat the class action, including safe harbor rules, reliance, and issues of commonality or typicality. States, however, are often at a disadvantage in evaluating these issues. Third parties often have facts that create a risk of dismissal, but which are unknown to the States. Given the risk of inaccuracy in predicting whether a

class will survive, the States would be placed in the untenable position of taking affirmative action in the form of premature intervention or opt-out litigation to protect their interests, or risk losing their claims altogether. This imposes significant and unnecessary burdens on governments that already face budgetary and competing demands for resources.

The facts of this case and *IndyMac* highlight the burdens imposed on States, as well as how the Second Circuit distorts the rules and procedures for class actions. For instance, under Fed. R. Civ. P. 23, class members may participate or withdraw from a class action until they receive notice of the opt-out deadline. *See American Pipe*, 414 U.S. at 549. When CalPERS exercised these rights by opting-out of a proposed class settlement before the court-ordered deadline and filing its own action, the district court dismissed it as untimely under Section 13's limitation period and the Second Circuit affirmed. *In re Lehman Bros. Sec. & ERISA Litig.*, 655 Fed. App'x 13, 2016 WL 3648259 (2d Cir. July 8, 2016).[1]

Rule 23 also permits members of a class to intervene to protect their interests, either because they do not believe they are being fairly represented by the named parties or the class is subject to dismissal. Charles A. Wright et al., 7B *Fed. Prac. & Proc. Civ.* § 1793, Westlaw (3d ed. & Suppl. Jan. 2017). *IndyMac* involved such a scenario. In that case, two public institutional investors brought

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[1] CalPERS' situation is common in the Second Circuit. *See SRM Glob. Master Fund Ltd. P'ship v. Bear Stearns Cos. L.L.C.*, 829 F.3d 173 (2d Cir. 2016) (dismissing under similar fact pattern); *Kuwait Inv. Office v. Am. Int'l Grp., Inc.*, 128 F. Supp. 3d 792 (S.D.N.Y. 2015) (same).

separate securities class actions. *IndyMac*, 721 F.3d at 102. The district court consolidated the two actions and appointed Wyoming as lead plaintiff. *Id.* Wyoming then filed an amended consolidated class complaint raising claims on behalf of itself and other asserted class members. *Id.* at 103; *see also In re IndyMac Mortgage-Backed Sec. Litig.*, 793 F. Supp. 2d 637, 641 (S.D.N.Y. 2011).

One year later and after the limitation period had run, the district court dismissed for lack of standing all of the claims in the amended complaint arising from the offering of securities not purchased by Wyoming. *IndyMac*, 721 F.3d at 103. When six state and city entities, including one of the original plaintiffs in the consolidated action, moved to intervene in order to cure this defect, the district court denied the motions, finding that *American Pipe* did not toll their renewed claims in the face of Section 13's limitation period. *Id.* at 103.

As evidenced by these circumstances, analyzing and deciphering all of the countless factors that could lead to the failure of a particular class action is a substantial burden that comes with a significant risk of error. States and other putative class members should not be forced to bear these risks, especially when Rule 23 was meant to alleviate this burden for purported class members. *Cf. American Pipe*, 414 U.S. at 551-52 ("Rule 23 is not designed to afford class action representation only to those who are active participants in or even aware of the proceedings in the suit . . . ."). Indeed, *American Pipe* itself relieved class members of the very burdens that the Second Circuit's decisions now impose:

> "Not until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case." *American Pipe*, 414 U.S. at 552.

Forcing States to monitor the limitation period in all securities class action matters and evaluate the risk of failure will all but eliminate the protections of Rule 23 and *American Pipe* in this regard.

The sheer number of securities class actions amplifies the States' burden. From 2011 to 2015, an average of 221 securities class actions were filed each year. Stephan Boettrich & Svetlana Starkh, NERA Econ. Consulting, *Recent Trends in Securities Class Action Litigation: 2016 Full-Year Review* (Jan. 23, 2017), at 2, http://www.nera.com/publications/archive/2017/recent-trends-in-securities-class-action-litigation--2016-full-y.html.html. In 2016, the number of filings reached a record number of 270. *Id.* at 3; Cornerstone Research, *Securities Class Action Filings: 2016 in Review* (2017), at 5-6, https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2016-YIR. While increased merger and acquisition objection filings contributed to this record, traditional securities actions were 11 percent higher in 2016 than in 2015. *Securities Class Action Filings* at 5. In comparison to the number of new filings each year, the number of pending cases is staggering. For example, from 2011 to 2016, the number of ongoing cases went up from 533 to 674. *Recent Trends* at 26. The resources needed to

evaluate that number of potentially relevant cases and the limitation period within each case places an unnecessary and heavy burden on the States.

The Second Circuit's decisions unreasonably increase costs, complexity, and risk for States seeking to responsibly protect beneficiaries and the public funds entrusted to them, and should be reversed.

C. The Second Circuit's Rule Undermines the Value of Securities Class Actions

One way for States to protect the public and beneficiaries from time-barred claims is to file early duplicative litigation. Such recourse strays from the aggregative benefits of securities litigation. It also substantially increases the overall cost of litigation for the States, defendants, and the courts. And, it should be unnecessary.

Securities fraud claims have long been subject to aggregation. Aggregation benefits the public by preventing violators from escaping liability simply because individual investors' damages are too small in comparison with the expense of litigation. Michael J. Kaufman & John M. Wunderlich, *The Judicial Access Barriers to Remedies for Securities Fraud*, 75 Law & Contemp. Probs. 55, 59 (2012). It benefits the judicial system by consolidating similar actions to avoid duplication and create efficiencies. William B. Rubenstein et al., *Newburg on Class Actions* § 4:47 (5th ed. 2016). Aggregation in securities actions also benefits defendants in that they can achieve finality over a large number of potential claims, thus limiting their financial liability and costs. *Civil Procedure—Class Actions—Second Circuit Holds*

that American Pipe Class Action Tolling Doctrine Does Not Apply to Statute of Repose In Securities Act of 1933: Police & Fire Retirement System of Detroit v. IndyMac MBS, Inc., 721 F.3d 95 (2d Cir. 2013), 127 Harv. L. Rev. 1501, 1507 n.54 (2014).

Rule 23 and the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. 104-67 (Dec. 22, 1995), likewise contribute to the aggregate nature of securities claims by "funnel[ing] as many claims as possible arising out of a given fraud into a single action managed by a single institutional-investor plaintiff and litigated by a single law firm." *Civil Procedure—Class Actions* at 1508. *American Pipe*, too, promotes aggregation by protecting putative class members' claims until class certification is resolved or the opt-out deadline passes, thus incentivizing class members to await resolution. *American Pipe*, 414 U.S. at 550-52. The Second Circuit's rule, however, unravels all of these benefits by encouraging premature intervention and duplicative litigation.

As evidenced by the facts of this case and *IndyMac*, the risk of barred claims in the face of statutes of repose is significant. Both Rule 23 and the PSLRA contemplate that decisions regarding appointment of a single named plaintiff and class certification will be decided early in the litigation. *See* 15 U.S.C. § 78u-4(3); Rule 23(c)(1)(A). However, myriad factors can delay resolution of these issues, including the timing of consolidation, the complexity of the case, and whether defendants engage in class discovery or extensive motions practice. Charles A. Wright et al., 7AA *Fed. Prac. & Proc. Civ.* § 1787.3, Westlaw (3d ed. & Suppl. Jan. 2017). Delays create

significant risks for putative class members, risks that weigh heavily on States tasked with the responsibility of protecting public and beneficiary funds from losses.

A rational response to these risks created by the Second Circuit is for States to initiate parallel actions or to file motions to intervene in meritorious cases. In the *Petrobras Securities Litigation*, for example, thirty-two institutional investors, including five state entities, chose to file separate actions. *See, e.g.*, *New York City Emp. Ret. Sys. et al. v. Petroleo Brasileiro S.A.-Petrobras et al.*, No. 1:15-CV-02192 (S.D.N.Y. filed Mar. 23, 2015); *Washington State Inv. Bd. v. Petroleo Brasileiro S.A.-Petrobras et al.*, No. 1:15-cv-03923 (S.D.N.Y. filed Apr. 10, 2015). Rather than encouraging the efficient aggregation and resolution of the claims, the Second Circuit has encouraged duplicative and potentially unnecessary litigation. It causes putative class members to file early intervention motions to protect claims from possible dismissal while causing others to file separate litigation to protect their rights.

Although these actions mitigate the risk of time-barred claims, they are not without cost. Litigating complex securities matters requires allocating significant resources by public entities. The increased devotion of resources and costs does not, however, just fall on public entities that choose separate litigation. It also falls on the courts and the defendants who must respond. The Second Circuit's decisions promote duplicative litigation, waste valuable judicial resources, and undermine the efficiencies associated with aggregate litigation.

D. The Second Circuit's Rule Impedes Individual Access to Justice

Access to justice plays an imperative role in class actions. Securities class actions provide access to the courts for those with small monetary claims that could not otherwise be pursued. "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)). Although the Second Circuit's rule incentivize large, sophisticated investors to protect their claims by filing separate, duplicative litigation, small investors are left unprotected. Small investors typically lack the means to protect their investments. Millions of shareholders hold securities in brokerage accounts throughout the nation. Millions more hold securities in personal 401(k), deferred compensation, and other pension funds. The States have a fundamental interest in ensuring that these individuals have a pathway to justice in the face of securities fraud.

Small claim holders will be denied access to the courts because the economies do not justify protective litigation, and because they lack the means to monitor or intervene in litigation that affects their claims. Importantly, even large investors like the States may hold relatively small investments as part of their diversified portfolios, placing them in the same position as small claimants in securities litigation. Access to justice will be lost

not just for the States, but also those most affected by the loss—the public.

The *American Pipe* rule helps protect access to the courts. Reversing the Second Circuit's decision, will help maintain a fair and efficient process that allows small claim holders a pathway to adjudicate meritorious claims.

CONCLUSION

The Court should reverse the Second Circuit and affirm *American Pipe* tolling for securities class actions. Doing so ensures continued access to justice, deters securities fraud, and benefits the states and the public.

RESPECTFULLY SUBMITTED.

ROBERT W. FERGUSON
Attorney General

CALLIE ANNE CASTILLO
Deputy Solicitor General
Counsel of Record

MARY LOBDELL
Senior Counsel

1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6200
calliec@atg.wa.gov

March 6, 2017

JAHNA LINDEMUTH
Attorney General of Alaska

LAWRENCE G. WASDEN
Attorney General of Idaho

DOUGLAS S. CHIN
Attorney General of Hawaii

TOM MILLER
Attorney General of Iowa

JANET T. MILLS
Attorney General of Maine

BRIAN E. FROSH
Attorney General of Maryland

BILL SCHUETTE
Attorney General of Michigan

LORI SWANSON
Attorney General of Minnesota

JIM HOOD
Attorney General of Mississippi

TIM FOX
Attorney General of Montana

HECTOR BALDERAS
Attorney General of New Mexico

ELLEN F. ROSENBLUM
Attorney General of Oregon

JOSH SHAPIRO
Attorney General of Pennsylvania

PETER F. KILMARTIN
Attorney General of Rhode Island

MARK R. HERRING
Attorney General of Virginia